

# Report of the Independent Audit into the State of Free Speech in Australia

31<sup>st</sup> October 2007

Report Chaired by Irene Moss, AO  
Commissioned by:

## AUSTRALIA'S RIGHT TO KNOW



NEWS LIMITED



The West Australian

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# **The Independent Audit of the State of Free Speech in Australia**

**IRENE MOSS, AO**

31 October 2007

Australia's Right to Know Coalition  
c/- John Hartigan  
Chairman and Chief Executive Officer  
News Limited  
2 Holt Street,  
Surry Hills, NSW

Dear Mr Hartigan

It is with pleasure that I publish the results of the audit for your coalition partners.

The audit reviewed legislation and practices related to free speech as it particularly affects the media in Australia today.

While difficult to generalise on the state of media freedom because of the diversity and spectrum of matters examined, if necessary to do so the audit would broadly conclude that free speech and media freedom are being whittled away by gradual and sometimes almost imperceptible degrees.

This observation accords with many of the suspicions and statements aired in public addresses by journalists and media chiefs of late, prompted by recent world rankings of media watchdog groups. Lower rankings for Australia resulted from some high-profile matters such as the introduction of tough anti-terrorism legislation and a couple of court cases.

One high-profile case was on the use of a conclusive ministerial certificate to block an FOI application on bracket creep, and another highlighted the need for shield laws to protect journalists from criminal conviction and the inadequate protection of the alleged whistleblower concerned. These rankings have prompted a closer examination of these and other areas of concern.

The audit's examination and resulting observations should ring alarm bells for those who value free speech in a democracy.

While Australia is generally accepted as a land of freedom and compares well internationally on many fronts on civil rights, this should not be taken for granted.

What the audit can observe is that many of the mechanisms that are so vital to a well-functioning democracy are beginning to wear thin. Their functioning in many areas is flawed and not well maintained.

We point to areas of general access to information where governments should be more open and accountable, the growing use of spin and the raising of barriers to mask information rather than reveal it - showing that the free flow of information is not just an issue of law and regulation, but one of a growing culture of secrecy and mutual mistrust.

Our research bears out the coalition's claim at the launch of your campaign that there are about 500 pieces of legislation which, to one degree or another, contain "secrecy" provisions or restrict the freedom of the media to publish certain information.

Freedom of Information laws and regulatory tools that are meant to facilitate the flow of information do not serve the public well on matters of government accountability.

The audit also looked at the many barriers to getting access to information in courts and found the area wanting.

Institutionalised support for whistleblowers, important for exposing corruption or maladministration, is either non-existent or flawed and administration of these laws is carried out with very little leadership commitment.

Shield laws are still not in a state to give adequate protection for journalists.

Compounding this deteriorating state of affairs, often legislation on an issue - be it about whistleblowers, FOI, privacy, access to court documents or other information - is inconsistent or lacking in uniformity from one jurisdiction to another. This inconsistency in legislation is found not only in its substance but also in its implementation processes. Even within jurisdictions the administration of suppression orders or conflicts in complying with privacy laws are evident.

Naturally, media organisations find this environment particularly difficult as it frustrates their role of providing information. This is clearly unsatisfactory and unless addressed will only contribute to the continuing backward slide towards a less informed society.

On the other side of the ledger, the audit did not examine how well the media performs or how well journalists adhere to their codes of conduct. That was not in the audit's brief, but the audit is only too well aware of criticisms levelled at the media for bias or inaccurate reporting.

However, quality of media performance should be irrelevant to governments' commitment to accountability and openness. It should be irrelevant to how well governments administer mechanisms which facilitate free flow of information and transparency. Two wrongs don't make a right.

I should record that in view of the time and resources available we have not been able to explore every area affecting free speech and media freedom. In the report we identify the subjects we have not covered. In some cases, further research may be warranted.

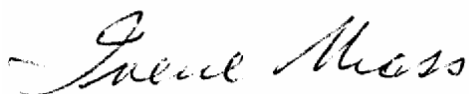
The related areas we explore resulted from talks on key areas of concern with the coalition.

Each particular topic presented specific areas of concern, some serious, some less so, some difficult to assess because of the difficulty, if not impossibility, of obtaining relevant information in that area.

It is difficult to make historical comparisons of the state of free speech and media freedoms in Australia given a lack of comparable data. However this audit will provide an historical starting point for future comparisons and that is important if we aspire to improve. It will then require courageous leadership from all sides: the media needs to be more responsible, governments and institutions need to be more open.

Finally, I would like to acknowledge the work of and thank the rest of the audit team—Peter Timmins, Jane Deamer, Geoff Briot, Erin Tennant, Alison Larsen and Johanna Dickson. My thanks also go to the coalition partners, journalists, lawyers, academics and others who provided us with submissions, comments and documents and some law firms for their research.

Yours truly

A handwritten signature in cursive script that reads "Irene Moss". The signature is written in dark ink and is positioned above the printed name and title.

Irene Moss AO

Chair

Independent Audit into the State of Media Freedom in Australia

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# **INDEPENDENT AUDIT OF THE STATE OF FREE SPEECH IN AUSTRALIA**

## **EXECUTIVE SUMMARY**

There are no executive summaries for chapters 1, 2 and 3. Those chapters are of a summary nature themselves.

### **Chapter 4: Access to information**

Government policy documents at all levels commit to providing information as widely as possible. However, honouring that commitment is subject to the government's discretion. Unfortunately there is mounting evidence that the lure of political advantage increasingly trumps principles of democratic transparency when governments decide to withhold or bias the release of information.

Some types of information require protection from disclosure. As well as privacy and commercial interests, information of potential security significance also needs protection. Governments strictly limit documents on security grounds: policy "is to keep security classified information to the necessary minimum". But over-classification limits information available to the public. It also imposes unnecessary, costly administrative arrangements and may bring security procedures into disrepute if classification is unwarranted. In a report in 2000, the Australian National Audit Office found that all organisations it audited incorrectly classified files, with over-classification the most common fault.

#### **Public interest immunity**

Public interest immunity has been relied on by government agencies, under both the common law and statute law, to refuse to provide documents or give evidence in court on the basis that it would be contrary to the public interest to do so. The claim is also made by governments on occasions to refuse to release documents to or answer questions from MPs. Claims to public interest immunity differ in the way courts and parliaments treat them.

Public interest immunity claims also extend to the functions of governments. One way of ensuring accountability of government is scrutiny and review by upper houses of Parliament (except in Queensland and the territories which do not have upper houses) of legislation, appropriation Bills and large government contracts, to use a few examples. Much of this is done on the floor of the house or in committees, in which the major parties and independents take part. This process also helps the greater flow of information through Parliament to the public, usually with the media as the vehicle.

But the practice of the Federal Government, particularly since it gained control of both houses of Parliament, has been roundly criticised.

## **Journalists' experiences**

Overwhelmingly journalists complain they are denied access to information, particularly background information on government decisions. They say the flow of information is controlled, largely because of the centralisation of the source of government information. In what now appears to be the majority of cases, public servants are prohibited from giving journalists information directly. Journalists are either referred to the department's media section or the minister's office. Their experiences and comments provide a telling account of the flow of information from governments at all levels. This audit sets out comments from journalists across the country. Save for some slight editing, the words are reproduced verbatim.

## **News conferences**

Canberra journalists say the news conference system has become worse under the Howard Government. Gallery journalists complain that conferences—now conducted in the US Presidential style—are short and do not allow free-ranging questions. The politician will say what he/she wants to say and not allow questions or provide only trivial answers. The media is usually given short notice, allowing journalists little time to research and prepare questions. Some journalists say certain media representatives are selected, rather than all being given the opportunity to attend. This style of conference allows the politician to side-step important issues by giving “soft” answers. In the words of one, the present type of conferences is “... not submitting yourself to scrutiny”. One senior journalist described it as “government by announcement”.

## **Talkback radio**

Canberra-based journalists complain of the trend of the Prime Minister to use talkback radio to their detriment. These broadcasts allow politicians to make political statements without close questioning by political journalists. One journalist described them as easy avenues to reach a mass audience without facing “more difficult or less convenient questions on the national agenda”.

## **Spin**

Journalists contributing submissions to this audit say that government PR staff all too often try to block or frustrate, rather than facilitate, their inquiries. Directing all inquiries through ministers' offices, restricting the government employees with authority to speak to the media, demanding that all questions be submitted in writing, taking a long time to respond to questions, offering answers of little value, and completely ignoring some questions, are the common features in a long list of grievances submitted to this audit.



## **Chapter 5: Protecting whistleblowers and journalists' sources**

No current legislation defines the terms “whistleblower” or “whistleblowing”, but eight Acts and three Bills across Australia deal with the subject.

Whistleblowing law in Australia varies widely between the nine jurisdictions—federal, six states and two territories. The types of disclosers and the nature of disclosures vary; the level and forms of protection vary; and the type and severity of penalties for reprisals, including breaches of employer obligations, vary.

There is significant inconsistency in whether a law applies to the public and/or private sector.

The limited scope of the whistleblower legislation has been criticised. Comprehensive application to all sectors needs debate. A clear public sector focus may be appropriate.

There is significant inconsistency in the types of wrongdoing about which disclosures can be made that trigger the relevant legislation. In some circumstances the conduct about which a disclosure is made is too general and outside the realm of whistleblowing. In other cases such conduct is too narrowly defined, for example, only unlawful behaviour. Only three laws (South Australia, Queensland and Western Australia) take a comprehensive approach to identifying the public sector wrongdoing that qualifies disclosures.

There are significant gaps in the nature and extent of protection provided. Whistleblowers need to be relieved of potential liability for their disclosure, such as the risk of disciplinary or criminal prosecution for unauthorised disclosure of information or civil action such as defamation. Damages are only available through employment, anti-discrimination or EEO tribunals. Only three jurisdictions provide injunction or compensation remedies for potentially or actually aggrieved whistleblowers.

The Federal Parliament has traditionally lacked a general power to implement comprehensive whistleblower legislation. It has used the corporations power to provide for protection in specific private sector areas. However, it does not lack power to legislate to protect its own employees and contractors.

It might be appropriate to have a single national legislative regime dealing with all aspects of whistleblowing (public and private). The two states (Queensland and South Australia) which have tried have produced unsatisfactory results.

A key issue arises from the distinction between leaks in general and the sub-class of leaks that are public interest disclosures (PIDs). In short, it is logical that if there is a public interest in such disclosures then their messengers should be encouraged and protected rather than shot at.

A strong case can be made for uniform public interest disclosure legislation. A new-model federal law should at least protect whistleblowers who disclose to the media after making a reasonable attempt to have the matter dealt with internally, or where such a course was impractical.

Journalists in Australia are inadequately served by shield legislation and the common law in relation to their ability to protect the identity of their sources.

Particularly in relation to the new shield provision in the Commonwealth *Evidence Act*, since any unauthorised communication of information remains criminalised even where it is a PID, this exception seems bound to apply in nearly all cases of leaks of information to journalists. Hence the privilege apparently offered is a sham.

Improving Australian shield laws will be to little effect in relation to government information if the sources whose identity those laws are designed to protect face exposure through a conjunction of political forces. That conjunction, at least at Commonwealth level, involves a dogged refusal to provide substantial legislative protection to whistleblowers together with a relentless determination to track down the source of disclosures which the aforementioned refusal ensures remain “unauthorised”. That determination was perhaps best expressed by the Secretary of the Prime Minister’s Department, Peter Shergold, who was quoted as saying “if some people seem surprised that I have called in the police to deal with leaks, they shouldn’t be—I always have and I always will”.

There are in essence two approaches to shield legislation and the guidance it provides the judiciary. The first rests on the presumption that disclosure of journalists’ sources is necessary unless there is some case made out to resist disclosure. In short, the onus is on the journalist. The alternative is that disclosure of sources is not necessary and a case must be made out on the basis of some compelling public interest as to why the presumption against disclosure should be overturned.

Clearly Australia has a long way to go before its legislation embodies the desirable second alternative.

There is a good case for an effective shield law regime based on a presumption that sources should not be revealed and journalists could be ordered to do so by a judge only on strictly limited grounds of compelling public interest.

## **Chapter 6: Freedom of information**

FOI laws work effectively and reasonably consistently when they are used to provide access to personal information about the applicant. A range of factors limit their effectiveness in ensuring access to documents relevant to government accountability—the very reason they were set up in the first place.

No government, federal, state or territory, has taken sustained measures to deal with an enduring “culture of secrecy” still evident in many agencies. There are few visible, consistent advocates of open government principles, within government systems and leadership on FOI is lacking.

FOI performance is patchy across all governments. In some agencies applications are managed in a professional manner and decisions on access reflect the law, its spirit and intent. In other cases the FOI process involves delay, high cost, and what could be seen to be obstruction, often suggesting attempts to protect politically sensitive information.

**Delay:**

- Some requests can take months or even years to resolve despite the fact that a limited statutory deadline applies to the processing of applications.
- A request in April 2005 to the Department of Defence for documents on Australia's position regarding rendition is still awaiting a determination.
- An application was made for the results of public opinion surveys carried out for the Department of Employment and Workplace Relations to assess the success of about \$32 million spent advertising the WorkChoices law. The department deferred access until later this year, presumably after the election. The reason for the delay was that a government committee wanted to see all the results of the surveys together. The department decided to withhold them all until such time. Using this argument, no results of any surveys ever need be released provided the government claims to have plans to conduct further surveys.
- In 2005-2006, 25 per cent of applications to federal agencies for non-personal documents took longer than 90 days to process, three times longer than the statutory time of 30 days. The Victorian Ombudsman reported only 56 per cent of decisions by government departments in 2003 were made within the statutory time of 45 days. Nearly 21 per cent of decisions took more than 90 days. Over 40 per cent of requests being handled by Victoria Police at any time during the period covered by the Ombudsman's review were taking more than 45 days.

**High cost:**

- The *Herald Sun* abandoned a two-year campaign seeking information about travel of federal politicians after it was quoted a fee of \$1.25 million, which amounted to 32 years of full-time work for a public servant. The Administrative Appeals Tribunal accepted that those named in the list would need to be consulted before disclosure, but the Government was entitled to seek payment for the time spent in consultation and decision-making.
- Decision making time chargeable to the applicant can run to hundreds of hours and thousands of dollars in charges. Included in an estimate of fees of \$12,718 for access to documents about the effect of global warming on the Great Barrier Reef are charges for 538.95 hours for making a decision on the status of the documents.

**Federal – State Differences**

Associate Professor Anne Twomey of the University of Sydney School of Law carried out research on the *Australia Acts* 1986. The Acts were passed by all Australian parliaments to sever residual links with the United Kingdom. She reported:

*The Commonwealth was a completely different story [from other jurisdictions involved]. After a bureaucratic process of meetings, submissions, reports, consultations, vettings, demands for ASIO security clearances, and scandalous delays lasting almost three years, only a small proportion of the Commonwealth's documents, described by officials as 'the innocuous ones', were released by the Commonwealth*

*Attorney-General's Department. The Prime Minister's own department still has not managed to release a document after three years. Access to legal opinions was also formally denied by the Attorney-General's Department, despite the fact that they were more than 20 years old. In contrast, the states, the United Kingdom and the Special Committee of Solicitors-General released their legal opinions.*

The existence of powers in the Federal Act for the issue of conclusive or ministerial certificates, and limited rights of review of the decision to issue a certificate, is inconsistent with the scheme of the legislation.

## **Common Problems**

Claims that FOI is achieving its intended purpose, including opening government activities to scrutiny and criticism, are not substantiated by the evidence.

In the federal arena in particular, FOI is marked by a high degree of legal technicality which dominates considerations about whether disclosure is in the public interest, or may demonstrate harm to an essential public interest.

There are inadequacies in the design of the laws; too much scope for interpretation of exemption provisions in ways that lead to refusal of access to documents about matters of public interest and concern; cost barriers to access; and slow review processes that often fail to provide cost-effective resolution of complaints.

Given the original objectives of FOI, there is a need for clarification about the extent to which advice to government should be based on notions of confidentiality. While some confidentiality about some advice in some circumstances may be appropriate, blanket claims seem counter to the objective of informing public debate, and accountability for government decisions.

## **Chapter 7: Anti-terrorism and sedition**

Australian anti-terrorism laws have been designed to significantly reduce the judicial watch on the executive power inherent in their operation. Even where such oversight is permitted, the laws restrict the media's ability to report and curtail the ability of people to communicate with journalists and others. While we discern general acceptance (including among media organisations) that threats from terrorism require a solid response, the essential issue is the extent to which it is reasonable to sacrifice basic freedoms in the cause of defending them.

The effect of anti-terrorism legislation means we are almost certainly unaware of the number of cases in which the legislation has been applied and the extent to which reporting on them has been prevented.

At least seven federal Acts provide for substantial penalties for those who breach their provisions.

The *Criminal Code Act* 1995 defines a "terrorist act" in section 100.1. The definition is broad. Vagueness in this area always invites the apprehension (if not ultimately the reality) of abuse in those, including the news media, potentially affected by the legislation.

The *Australian Security Intelligence Organisation Act 1979* provides for the issue of warrants to question and detain people (clearly including journalists) where it is reasonably believed the warrant “*will substantially assist the collection of intelligence that is important in relation to a terrorism offence*”. Again, this is a broad definition, characterised by vagueness.

The obvious problems with section 9A of the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007* relate to the vagueness of the phrases “indirectly counsels or urges” and “indirectly provides instruction”.

An example: Following clearance by the AFP, the DPP and the Classification Board, of eight books seized from Muslim bookshops, the federal Attorney-General, Philip Ruddock, in July 2006 referred the books to the Classification Review Board. It refused classification of two books on the basis that they promoted “jihad” and incited terrorism. The other six were given unrestricted classification. These were the first two books banned in Australia since 1973.

Once tried in relation to terrorism, the urge to ban can spill into other areas. In January 2007, after approval of Dr Phillip Nitschke’s euthanasia manual *The Peaceful Pill Handbook*, the Attorney-General referred it to the Classification Review Board. This resulted in the book being banned at the end of February 2007.

## **Sedition**

The last prosecution for sedition in Australia was in 1960 when Brian Cooper was sentenced to two months’ jail with hard labour for urging the natives of Papua New Guinea to demand independence from Australia. This followed the two previous cases, both in NSW—an unsuccessful prosecution in 1953 and the sentencing in 1950 of William Burns to six months’ jail for writing seditious articles.

The *Anti-Terrorism Act (No. 2) 2005* repealed most of the existing sedition provisions of the *Crimes Act 1914* and replaced them with new provisions. These new provisions have been widely criticised, especially in submissions to the Australian Law Reform Commission review in 2006. Dr Ben Saul of the Gilbert+Tobin Centre of Public Law at UNSW submitted that there was no case for “modernising” sedition law because of a history of its manipulative use against legitimate political opponents; the prosecution of trivial statements which lack any real connection to violence; its propensity to unjustifiably interfere with freedom of expression and opinion; its historically vague, uncertain and unpredictable scope; its modern redundancy in light of many overlapping (but more precisely framed) offences; its disuse over many decades; and widespread public unease about—and considerable ridicule of—sedition offences.

The principal problems with the provisions have been identified as:

- the imprecision of the key verb “to urge”;
- it is no longer necessary to prove an intention to promote ill-will and hostility to establish seditious intent;
- there is no requirement that the person “urging” have any particular intention, such as in the previous *Crimes Act*;
- violence need not be violence incited within the Australian community—it would suffice that the urging occurred to a group of a different nationality or political opinion to use force against any other person in any other place, the effect of which would “threaten” the peace of the Commonwealth;
- the urging need only be to engage in conduct that provides assistance to a (vaguely defined) organisation engaged in armed hostilities against the Australian Defence Force. This could extend to verbal support for insurgent groups who might encounter the ADF in their country;
- inciting terrorism is unlawful under pre-existing law. This indicates these provisions will extend to the murkier concept of “indirect urging” as well as condoning or justifying terrorism or even abstract opinions about that conduct;
- section 80.4 extends the geographical reach of the provisions via the *Criminal Code* so any “offence will be committed whether or not the conduct or the result of the conduct constituting the offence occurs in Australia”. It covers any person of any citizenship or residence. There is no foreign law defence. It in effect creates a universal jurisdiction.

## **Chapter 8: The justice system**

Despite its explicit acceptance by governments, the judiciary, the media and the public, the principle of open justice has been eroded over recent years.

A main contributor has been the threat of terrorism. However, limits on access by the media to court documents and information and an increase in suppression orders (particularly in the lower courts) are examples of where the principle is seen as threatened.

Journalists report not only difficulty getting access to court documents and information, but also a lack of clear guidelines on such access. They sometimes report a virtual capriciousness by some members of the judiciary and court officers when deciding whether to allow access.

There is no uniform approach to the rules of access—even within a jurisdiction. For example, the Victorian Supreme Court has a clear practice but the Magistrates’ Courts do not. One Magistrate’s Court may make access easier, but a court in a nearby suburb may make it extremely hard. It often depends on the attitude of the magistrate or registry staff.

In the jurisdictions with media liaison officers the system appears to work more efficiently and more predictably.

There is also lack of uniformity about rules relating to the identification of children, whether they are accused of crime, victims of crime or witnesses. Nor is there uniformity on the naming of the accused in cases involving children, which could identify the child or children involved.

Across all jurisdictions there are problems with suppression orders. Sometimes there is even difficulty in getting clear information on whether a suppression or pseudonym order has been made and the reasons and legal bases for making it.

Courts appear to be making suppression orders far more often. The scope, precision and duration of the orders is sometimes not given or not easily found out. Different practices and methods across jurisdictions for informing the media that a suppression order has been made or amended sometimes expose the media unnecessarily to an inadvertent breach of the order.

There is confusion about the standing of media organisations to appear in relation to the making of, amending of or appeal against suppression orders.

The lack of uniformity in the legislation and rules and practices in relation to both access to court information and suppression orders poses added problems for media organisations which operate across borders and creates anomalies from one jurisdiction to the next.

## **Chapter 9: Privacy and defamation**

### **Privacy**

Media organisations and journalists recognise privacy as a value to be respected.

It is a right recognised in both international and Australian law and both it and freedom of expression are important in a democratic society.

The concept of privacy is still evolving in the light of technological changes that present new challenges about intrusions into private life.

Even without these challenges, Australia's privacy laws are complex and confusing, with large areas of overlap, gaps and inconsistencies. They have been referred to the Australian Law Reform Commission, which should give an opportunity for analysis, discussion and debate about how best to regulate, particularly in areas associated with personal information. A final report is due in March 2008.

Proposals for some changes to aspects of the system of regulation of the media concerning compliance with privacy requirements are currently the subject of public consultation. A proposal for a law on breach of privacy is also at the discussion stage. The cause of action proposed is not directed solely towards the media, but deals with a range of invasions of privacy.

Media organisations have made or are making submissions to both the Australian and NSW Law Reform Commissions arguing that the case has not been made out for a new law on invasion of privacy, either in NSW or more broadly in Australia.

They submit that the case for such a law has not been made, that the introduction of a statutory right to privacy "would substantially alter the balance by placing fundamental restraints on the media's role in upholding freedom of communication", and that existing privacy and publication laws adequately protect privacy rights.

Confusion and uncertainty about the operation of privacy laws has led to claims that information in certain circumstances cannot be disclosed “because of the *Privacy Act*” (BOTPA).

While BOTPA may be a myth, frequent resort to this mistaken justification for refusal of access to information strongly supports the need for reform and simplification of the laws. The myth has been reality many times when privacy laws have been cited as reasons for refusing access to information, the disclosure of which would arguably be in the public interest.

The Australian and NSW LRCs have acknowledged the importance of freedom of expression and the need to retain a right to publication in the public interest.

### **Defamation**

Defamation law provides important protection against damage to reputation. The uniform laws now in place are a significant improvement in balancing freedom of expression and the right to reputation. Evidence suggests a reduction in the writs issued against media organisations since the laws came into effect in January 2006.

However, some have expressed the view that the reforms did not go far enough. The Australian Society of Authors, for instance, says:

*Australia’s authors suffer more than most from censorship because we cannot afford to defend our legal rights, truncated as they are. Not one book in a thousand earns the author and publisher enough to cover the average cost of defending a defamation suit, \$140,000.*

And to the disappointment of some, Australian defamation law contains no “public figure” test of the kind available in the United States.

Australia also appears to lag behind other countries in ensuring protection against liability where matter has been published in the public interest after reasonable precautions have been taken by the publisher.

It has been suggested that it is still too early to tell whether the uniform laws, in practice, represent a better balance of the rights and interests of individuals and others who write and publish. Much will depend on the approach taken by the courts.



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# **CHAPTER 1**

## **BACKGROUND**

### **1.1. Australia's Right to Know Coalition**

In May 2007 Australia's leading media organisations formed a coalition called "Australia's Right to Know". The coalition is concerned about what it sees as an erosion of free speech at all levels of government over recent years. This historic partnership of print and electronic media aims to try to tackle what the CEO of News Limited, John Hartigan, describes as "... an alarming slide into censorship and secrecy that has reduced what ordinary Australians can and can't know about how they are governed and how justice is dispensed".

The coalition members are News Limited, Fairfax Media, FreeTV Australia, commercial radio, ABC, SBS, Sky News, ASTRA, West Australian Newspapers, the Media, Entertainment and Arts Alliance (MEAA), AAP and APN News and Media.

As part of its campaign, the coalition funded an independent audit on the state of media freedom in Australia.

At its launch, the coalition said the report "will form the basis of a campaign of public consultation and debate with government and opposition parties and the judiciary".

### **1.2. The independent audit of the state of free speech in Australia**

The audit team was Irene Moss AO as chair, Peter Timmins as deputy chair and Jane Deamer as research director. Erin Tennant and Geoff Briot carried out some research and took part in writing the report. Alison Larsen assisted the research team and Johanna Dickson provided administrative support.

#### **1.2.1. Terms of reference**

The audit was asked to look at limitations on, and threats to, free speech and press freedom, in particular federal, state and territory laws that have an impact on media access to and dissemination of information and the public's right to be informed.

The audit examined attempts by government to control the media in its reporting functions; constraints in current laws; and issues arising from their implementation and interpretation that have this effect. In particular:

- access to government information, including freedom of information and associated laws;
- access to information about proceedings in the courts, including suppression orders and the use of contempt laws;
- the seizure of records, use of subpoenas and protection of journalists' sources;

- protections for, and liability of, whistleblowers and others who disclose government-held information;
- anti-terrorism and sedition laws;
- defamation and privacy laws.

### **1.2.2. What the audit did not cover**

Issues of concern to media organisations, practitioners and others that, given the time and resources available, did not permit us to cover in any substantive way are listed below. In some cases we considered them to be outside the scope of our terms of reference. It may be that further research or comment is required about, for example:

- Whether there should be a federal or states Bill or Charter of Rights.
- Media ownership and the concentration of media.
- How well the media do their job and what they do or do not cover.
- Issues of alleged bias and/or balanced reporting or opinions.
- Changes and challenges arising from the growth of electronic journalism.
- How legislation and practices may constrain the public generally and, in particular, non-government or quasi- government organisations. We include in this charitable institutions, human rights or community organisations, universities and academics and rights of the public to demonstrate against governments (such as the controls at the APEC meeting in Sydney in September 2007).
- Increased resort to litigation or the threat of litigation by commercial interests said to be designed to limit or constrain public debate. This includes such things as “Strategic Litigation Against Public Participation” (SLAPPs), and changes to the secondary boycott provisions of the *Trade Practices Act* to permit the Australian Consumer and Competition Commission to take class actions on behalf of business interests against protesters who they allege have affected their commercial operations.
- Government funding of publicly owned media and any alleged influence over content and operations.
- The capacity of the financial power of increased government advertising to influence media coverage of government activities.
- Censorship, classification and content regulation (except as it relates to anti-terrorism measures).
- Anti-vilification.

### **1.2.3. The audit process**

This was not a public inquiry. However, if anyone outside the media or academia expressed an interest or view they were welcome to make submissions. A small number were received.

Discussions were held with some media coalition members.

We researched relevant literature.

About 300 journalists and media lawyers were surveyed or personally interviewed or consulted.

Academics were consulted and several submissions and published documents were submitted and reviewed.

Discussions were held with or submissions received from interested parties such as the Press Council of Australia and the Australian Privacy Foundation.

Legal research was conducted by some private law firms.

For those organisations and individuals who provided assistance, information, submissions and/or documents, please see acknowledgments at the end of and in the body of this report.

This report has been compiled on the basis of the research and the consultations held.

### **Acknowledgment**

While they provided assistance, information and support, there was no attempt by any of the coalition members to interfere with or influence the scope or the result of our research. The coalition members, like other individuals and organisations, were invited to make submissions to the audit. Some did.

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## **CHAPTER 2**

### **THE ROLE OF THE NEWS MEDIA**

#### **2.1. Role of the news media in a democratic society**

The role of the news media in a democratic society springs from the right of people to gain information about matters of public concern. Australians, as members of a mature democracy, claim a freedom to have a say in the workings of a government elected on their behalf; an entitlement to debate the wisdom of government conduct; and to demand that policymakers defend chosen paths of action. Our society is more likely to benefit from good government, it is held, if decisions are open to public discussion.

Such a discussion relies on access to information. People participate effectively in a democracy and may hold their government accountable only if informed well enough to do so.<sup>1</sup> In this context the news media assume a special role as both a conduit and as a public watchdog. Through print, radio, television and the internet, news organisations are well placed to disseminate ideas and information. Their role is to gather and report news about the operations of government and other issues of public interest. They are even regarded as a “fourth estate” in the machinery of democratic governance, acting on behalf of the public to bring to its attention any political, economic or administrative abuses of power.<sup>2</sup> In this sense, the news media help people get enough material to contribute to political debate in an informed and substantive way.

#### **2.2. Freedom of speech**

Journalists are not the only custodians of free speech. Everyone in a democracy has the right to freedom of opinion and expression: to put across their views without interference and to seek, receive and impart information and ideas through any channel. Such freedom to communicate empowers us with knowledge about the society in which we live. It allows for the discovery of truth over error and for people to exercise autonomy by making informed choices.

Free expression also encourages a government to be answerable to its people. Indeed, because of advances in internet communications, at no time in history have governments been better able to answer directly to people, whether through online portals to government agencies or popular websites such as MySpace and YouTube—and to do so without the news media acting as an intermediary or filter.

While it remains the case that journalists enjoy special access to events such as news conferences, court trials, war zones and disaster scenes, it is less apparent that they enjoy rights of expression any wider than the principles of free speech that protect ordinary people.<sup>3</sup> For the purposes of this audit, we will not distinguish between the rights of the institutional press and those of ordinary, individual speakers who exercise their democratic free speech rights through public protest, non-fiction books, academic research, speeches or internet blogs.

Our approach is to treat press freedom as an instrumental right: any special privileges the news media claim should be protected only insofar as they promote our interest in freedom of expression generally.

### **2.3. What are the limitations of access to, and publication of, information and comment, including rights and responsibilities?**

Just as the rights of journalists are the same as those of ordinary speakers, so too principles that restrict freedom of speech also impose limits on the press. We balance the rights of a person to speak openly against other values our society upholds. These include public safety and security, the right to a fair trial, individual privacy and the protection of intellectual property. To this extent—and as some journalists acknowledged in their submissions to this audit—news organisations should not publish material that incites violence or unlawful activity; threatens state security; harms the fairness of judicial proceedings; exposes an individual’s personal activities without justification; or exposes confidential corporate information without an overriding public benefit.

Added to these values is a set of responsibilities applying to news media that recognises their special role as a fourth estate. These responsibilities are entrenched in an industry code of ethics<sup>4</sup> and involve a commitment to the public interest<sup>5</sup> and a respect for truth and accuracy.<sup>6</sup> There is also an expectation that editorial judgments are made free from the influence of any proprietor, advertiser or other outside interests.

Limits on the scope of information journalists may access will be explored in later chapters. Arguments based on free-speech principles usually assume a freedom to communicate and receive information from generally available sources, and do not cover information not publicly released.<sup>7</sup> However, this audit also acknowledges that freedom of speech and freedom of the press are of little value unless the speaker or publisher has acquired enough information to pass on to its audience, which may in turn join public debate in a meaningful way. This principle establishes a duty on governments to be accountable and to keep people informed (see Chapter 5).

### **2.4. The Australian context**

Australian political leaders have spoken on the record about their support for free speech. Prime Minister John Howard has described “complete freedom of speech” as “the Australian way”, placing it beside our parliamentary system and independent judiciary as one of “the three great pillars of a successful society”.<sup>8</sup> On the importance of press freedom, Mr Howard has said that “the existence of an open, robust, free and usually highly critical media” serves to “underpin the Australian democratic experience”.<sup>9</sup> On the other hand, federal Attorney-General Philip Ruddock has made it clear he has little sympathy for the view that the press acts as any proxy for the public in Australia’s democratic society, claiming that our *Freedom of Information Act* is “not designed as a research tool for the media”.<sup>10</sup>

Australia in fact endorsed free speech principles almost 60 years ago when it signed the United Nations Universal Declaration of Human Rights, which includes a free speech clause in Article 19. The UN General Assembly proclaimed the declaration in 1948 and called on all member countries to publicise the text and “to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions”.

Under domestic law, however, there remains no provision in either Australia's Constitution or any state or territory constitution—except Victoria and the ACT<sup>11</sup>—that unequivocally guarantees freedom of speech and a free press. The Australian High Court, from two landmark cases in 1992, has gone just far enough to provide for an “implied” freedom of political communication,<sup>12</sup> but this establishes only a limit on legislative power, as opposed to a positive right to freedom of speech. The absence of an explicit protection for free speech sets Australia apart from other Commonwealth countries, such as the United Kingdom,<sup>13</sup> Canada<sup>14</sup> and New Zealand,<sup>15</sup> as well as the United States.<sup>16</sup>

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<sup>1</sup> Eric Barendt, *Freedom of Speech* (2<sup>nd</sup> ed, 2005) 18.

<sup>2</sup> Slavko Splichal, *Principles of Publicity and Press Freedom* (2002) 39.

<sup>3</sup> Geoffrey Marshall, 'Press Freedom and Free Speech Theory' (1992) *Public Law* 40, 41.

<sup>4</sup> Media, Entertainment and Arts Alliance, Code of Ethics

<[www.alliance.org.au/media\\_alliance\\_code\\_of\\_ethics](http://www.alliance.org.au/media_alliance_code_of_ethics)> at 15 October 2007. Some individual news organisation have drafted their own codes which closely reflect the MEAA's wording. See for example <[www.smh.com.au/ethicscode](http://www.smh.com.au/ethicscode)> at 15 October 2007.

<sup>5</sup> David Anderson, 'Freedom of the Press' (2002) 80(3) *Texas Law Review* 429, 451. The 'public interest' is an elusive concept: in one instance it might be attached to the maintenance of free speech and the free flow of information, while in another it can mean a person's right to a fair trial or the maintenance of public safety. For our purposes, a publication in the public interest refers to a matter of serious concern or benefit to the public, such as government policy, and not something merely of interest to the public, like the private life of a celebrity. For a more detailed discussion of the range of conflicting or competing public interest considerations in any system of representative democratic government, see Chris Wheeler, 'The Public Interest: We know it's important, but do we know what it means' (2006) 48 *AIAL Forum* 12

<<http://law.anu.edu.au/aial/Publications/webdocuments/Forums/Forum48.pdf>> at 15 October 2007.

<sup>6</sup> Respect for the truth and the right of the public to the truth is the first duty of a journalist, according to the International Federation of Journalists <[www.uta.fi/ethicnet/ifj.html](http://www.uta.fi/ethicnet/ifj.html)> at 15 October 2007.

<sup>7</sup> Eric Barendt, *Freedom of Speech* (2<sup>nd</sup> ed, 2005) 194.

<sup>8</sup> John Howard 'Speech at community morning tea' (Speech delivered at Whitehorse Club, Burwood, Victoria, 4 September 2001); John Howard 'Address at the An-Nahir Newspaper' (Speech delivered at an official cocktail reception, Bankstown, Sydney, 16 December 1997).

<sup>9</sup> John Howard 'Address at the opening of the 13th Commonwealth Law Conference, and 33rd Australian Legal Convention' (Speech delivered at the Melbourne Convention Centre, Melbourne, 14 April 2003).

<sup>10</sup> Philip Ruddock 'Australian Institute of Administrative Law Reform speech' (Speech delivered at the Australian Institute of Sport, Canberra, 14 June 2007).

<sup>11</sup> Victoria has a *Charter of Human Rights and Responsibilities Act* 2006. The Australian Capital Territory also has a *Human Rights Act* 2004.

<sup>12</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

<sup>13</sup> *Human Rights Act* 1998 gives further effect in UK law to the European Convention on Human Rights.

<sup>14</sup> A *Charter of Rights and Freedoms* is entrenched in Canada's 1982 Constitution.

<sup>15</sup> *Human Rights Act* 1993.

<sup>16</sup> The First Amendment, drafted two years after the US Constitution of 1789, states that Congress 'shall make no law abridging the freedom of speech, or of the press'.

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## CHAPTER 3

### THE STATE OF FREE SPEECH

#### 3.1. Australia ranked 28<sup>th</sup> in international press freedom index

Media freedom is broadly measured through those laws and practices that affect the capacity of journalists to report news.

By many accounts, media freedom has deteriorated in Australia over recent years. In the 2007 international index of press freedom released in October by Paris-based Reporters Without Borders,<sup>1</sup> Australia is ranked 28<sup>th</sup> out of 169 countries. Australia has slipped from 12<sup>th</sup> place in 2002, when the index was first produced. The index assigns a score and position to each country using several subjective indicators of press freedom<sup>2</sup> and is based on events covering the 12 months since September 2006. Reporters Without Borders this year focused on anti-terrorism laws in Australia that risk “being used abusively against the press” such as phone-tapping without judicial supervision or forcing journalists to give information and name sources to police or the courts.<sup>3</sup>

Freedom House, a Washington-based group that promotes democracy, is less generous in its assessment of media freedom in Australia. In its annual survey on global press freedom, Australia was ranked 39<sup>th</sup> from 195 countries in 2007,<sup>4</sup> down eight places on the previous year and behind such countries as Costa Rica, Malta and Taiwan. Freedom House uses a points system that measures “the degree to which each country permits the free flow of news and information”.<sup>5</sup> It noted similar concerns over Australia’s anti-terror laws as Reporters Without Borders, as well as issues not covered by this audit, including funding cuts to the Australian Broadcasting Corporation and changes to media ownership laws.<sup>6</sup>

New Zealand ranked 15, Canada 18, the United Kingdom 24 and the US 48 in the Reporters Without Borders index.

Both sets of rankings put us behind former Soviet bloc countries such as Lithuania and Latvia, but also acknowledge that Australia enjoys a level of media freedom higher than most of the world. Australian journalists do not disappear in the night or get murdered for their work, as allegedly happens in Russia. They are not threatened with reprisals by military censors if they challenge the ruling regime, as in Burma. They do not face death by torture, which was the fate of one Turkmenistan journalist last year, and nor is the Australian press wholly controlled by a ruling state authority, which happens in North Korea.

Nevertheless, the trend in Australia is downwards in both rankings for world media freedom. And it is corroborated by a steady stream of journalism commentary, academic research and public discussion that has documented what is perceived as a serious erosion of freedom of speech in general and press freedom in particular in recent years.

### **3.2. Secrecy in government**

In the contest for freedom of expression, Australian Centre for Independent Journalism director Chris Nash writes that journalists “fight on a terrain stacked against them”.<sup>7</sup> Fairfax Media director and part-owner John B. Fairfax, whose family established the Fairfax stable in the 19<sup>th</sup> century, has spoken of “an accelerating slide to secrecy in government”. “Over the past two or three years, ever so slightly, day by day ... our newspapers and our journalists are being prevented from doing our job, which is, first and foremost, to serve you,” he said in a recent speech.<sup>8</sup>

Commentator David Marr speaks of a press “misled, intimidated and starved of information”<sup>9</sup>; a view shared by Helen Ester, a university journalism lecturer whose interviews with Canberra press gallery journalists “paint a picture of cumulative deterioration in sources of political news and information, describing new layers of disempowerment, frustration and disinformation”.<sup>10</sup>

Ester’s analysis is one of several in an anthology published this year in which various Australian authors describe what they see as government-led threats to the capacity for public debate.<sup>11</sup>

What the audit refers to are not measures that literally silence people or prevent publications of dissent, but a more general, subtle shift in attitudes towards secrecy. Barriers to information, especially information seen as potentially sensitive, are now more difficult to navigate. More staff is devoted to filtering or putting a “spin” on such information. And when filters won’t suffice, there is a greater reliance on legal interpretation to block access altogether. What we have is a set of unofficial practices which together are whittling away the notion of easy and open access.

### **3.3. Freedom of Information**

One of the putative battlegrounds over press freedom in this country is the operation of our freedom-of-information (FOI) laws. These laws have been useful for individuals seeking personal information held by government agencies, but journalists have long complained they are unable to effectively hold governments to account given the scope of statutory exceptions for requested documents, the time taken to fulfil requests and the substantial processing costs. Freedom House, Reporters Without Borders and many journalists trying to make use of FOI laws claimed that media freedom in Australia suffered a major setback in September 2006 when the High Court supported the right of government ministers to withhold documents through use of conclusive certificates.<sup>12</sup> (See Chapter 6).

Government attempts to stifle freedom of expression are not just about deterring journalists, commentators argue, but involve a bid to intimidate public servants as well. Whistleblowers receive only limited legal protections in Australia, and those who risk leaking information concerning government policy or operations to the press are often the subject of federal police investigations. This year saw a former Customs official, Allan Kessing, prosecuted under the *Commonwealth Crimes Act* for allegedly leaking a damning report into security at Sydney Airport.

In the crown's case against the public servant Desmond Kelly, who was prosecuted for leaking a report that showed the government ignored recommendations for veterans' entitlements, the prosecution even demanded the two *Herald Sun* journalists who received the leak identify their source in court. This case, also noted by Freedom House and RWB, highlighted the lack of a shield law protecting journalists. (See Chapter 5).

In the years since the terrorist attacks of 11 September 2001, a raft of anti-terrorism legislation has emerged in Australia intended to be a response to the heightened risk of terrorism, but with direct consequences for media freedom. The ban on reporting details of any detention warrants, powers to detain and interrogate any journalist believed to have information on terrorist activities, and a modernised offence for sedition—laws that all carry jail terms for offenders—are said to create a chilling effect on the press and freedom of expression generally. Frank Moorhouse writes: “We are finding ourselves in a world where we no longer know what we are allowed to know and what we are allowed to say.”<sup>13</sup> This state of affairs, he continues, fosters “an ever-enlarging censorship environment and with it a feeling of being unfree”.<sup>14</sup> (See Chapter 7).

The capacity for journalists to report from courtrooms—and with it the doctrine of open justice—has also come under threat, with an apparent rise in the number of court-issued orders suppressing the reporting of evidence. This is especially so in Victoria, with many such orders related to the gangland murders and police under charge, creating what one leading lawyer described as “a minefield for reporters and pre-publication lawyers”.<sup>15</sup> (See Chapter 8).

Defamation laws still pose problems for media freedom, but considerably less so since uniform laws came into effect across Australia in January 2006, excluding almost all corporations from the right to sue, capping damages at \$250,000 and establishing truth as a complete defence. (See Chapter 9).

This audit will explore areas of concern to Australia's news media and try to assess what impact they are having on the ability of journalists to bear witness.

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<sup>1</sup> ‘Worldwide Press Freedom Index 2007’ Reporters Without Borders  
<[www.rsf.org/article.php3?id\\_article=24023](http://www.rsf.org/article.php3?id_article=24023)> at 17 October 2007.

<sup>2</sup> Reporters Without Borders prepares a questionnaire with 50 criteria that assess press freedom, including violations that affect journalists directly (such as murders, imprisonment, physical attacks and threats) and news media in general (censorship, confiscation of newspaper issues, police searches and harassment). The criteria also assess the level of self-censorship in each country and the ability of the media to investigate and criticise.

<sup>3</sup> See <[www.rsf.org/country-50.php3?id\\_mot=578&Valider=OK](http://www.rsf.org/country-50.php3?id_mot=578&Valider=OK)>

<sup>4</sup> Freedom House, *Freedom of the Press 2007: A global survey of media independence*  
<[www.freedomhouse.org](http://www.freedomhouse.org)> at 17 October 2007.

<sup>5</sup> Countries are given a total score from 0 (best) to 100 (worst) on the basis of a set of 23 questions that cover events from between January 2005 and December 2006. The criteria focus on the laws and regulations that could influence media content, the degree of political control over the content of news media, and the structure and concentration of media ownership. Data is collated using overseas correspondents, findings from human rights and press freedom organisations such as the International Freedom of Expression Exchange, specialists in geopolitical areas, government reports and various media reports.

<sup>6</sup> See <[www.freedomhouse.org/uploads/fop/2007/fopdraftreport.pdf](http://www.freedomhouse.org/uploads/fop/2007/fopdraftreport.pdf)>

<sup>7</sup> Chris Nash, “Freedom of the Press in Australia”, *Democratic Audit of Australia*, 11 November 2003  
<<http://arts.anu.edu.au/democraticaudit/>> at 23 May 2007.

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<sup>8</sup> Jonathan Pearlman, "Fairfax boss criticises secrecy in government" *Sydney Morning Herald* 6-7 October 2007, 10.

<sup>9</sup> David Marr, "His Master's Voice: the corruption of public debate under Howard" *Quarterly Essay Issue* 26 2007, 29.

<sup>10</sup> Helen Ester, "The Media" in Clive Hamilton & Sarah Maddison (ed) *Silencing Dissent: How the Australian government is controlling public opinion and stifling debate* (2007), 112.

<sup>11</sup> See n10 above.

<sup>12</sup> *McKinnon v Secretary, Department of Treasury* (2006) HCA 45. McKinnon, then a journalist with *The Australian*, had sought documents that would show how much extra income tax was being collected because of bracket creep, and how many wealthy Australians were rorting the First Home Buyer's scheme.

<sup>13</sup> Frank Moorhouse "The writer in a time of terror" *Griffith Review: The Trouble with Paradise* Summer 2006-2007, 13.

<sup>14</sup> *Ibid*, 54.

<sup>15</sup> Peter Bartlett "Court in the Act: Media and the Law in 2006" in *Official Spin: Censorship and Control of the Australian Press 2007* The Media, Entertainment and Arts Alliance report into the state of press freedom in Australia, 7.



## **CHAPTER 4**

### **ACCESS TO INFORMATION**

#### **EXECUTIVE SUMMARY**

Government policy documents at all levels commit to providing information as widely as possible. However, honouring that commitment is subject to the government's discretion. Unfortunately there is mounting evidence that the lure of political advantage increasingly trumps principles of democratic transparency when governments decide to withhold or bias the release of information.

Some types of information require protection from disclosure. As well as privacy and commercial interests, information of potential security significance also needs protection. Governments strictly limit documents on security grounds: policy "is to keep security classified information to the necessary minimum". But over-classification limits information available to the public. It also imposes unnecessary, costly administrative arrangements and may bring security procedures into disrepute if classification is unwarranted. In a report in 2000, the Australian National Audit Office found that all organisations it audited incorrectly classified files, with over-classification the most common fault.

#### **Public interest immunity**

Public interest immunity has been relied on by government agencies, under both the common law and statute law, to refuse to provide documents or give evidence in court on the basis that it would be contrary to the public interest to do so. The claim is also made by governments on occasions to refuse to release documents to or answer questions from MPs. Claims to public interest immunity differ in the way courts and parliaments treat them.

Public interest immunity claims also extend to the functions of governments. One way of ensuring accountability of government is scrutiny and review by upper houses of Parliament (except in Queensland and the territories which do not have upper houses) of legislation, appropriation Bills and large government contracts, to use a few examples. Much of this is done on the floor of the house or in committees, in which the major parties and independents take part. This process also helps the greater flow of information through Parliament to the public, usually with the media as the vehicle.

But the practice of the Federal Government, particularly since it gained control of both houses of Parliament, has been roundly criticised.

## **Journalists' experiences**

Overwhelmingly journalists complain they are denied access to information, particularly background information on government decisions. They say the flow of information is controlled, largely because of the centralisation of the source of government information. In what now appears to be the majority of cases, public servants are prohibited from giving journalists information directly. Journalists are either referred to the department's media section or the minister's office. Their experiences and comments provide a telling account of the flow of information from governments at all levels. This audit sets out comments from journalists across the country. Save for some slight editing, the words are reproduced verbatim.

## **News conferences**

Canberra journalists say the news conference system has become worse under the Howard Government. Gallery journalists complain that conferences—now conducted in the US Presidential style—are short and do not allow free-ranging questions. The politician will say what he/she wants to say and not allow questions or provide only trivial answers. The media is usually given short notice, allowing journalists little time to research and prepare questions. Some journalists say certain media representatives are selected, rather than all being given the opportunity to attend. This style of conference allows the politician to side-step important issues by giving “soft” answers. In the words of one, the present type of conferences is “... not submitting yourself to scrutiny”. One senior journalist described it as “government by announcement”.

## **Talkback radio**

Canberra-based journalists complain of the trend of the Prime Minister to use talkback radio to their detriment. These broadcasts allow politicians to make political statements without close questioning by political journalists. One journalist described them as easy avenues to reach a mass audience without facing “more difficult or less convenient questions on the national agenda”.

## **Spin**

Journalists contributing submissions to this audit say that government PR staff all too often try to block or frustrate, rather than facilitate, their inquiries. Directing all inquiries through ministers' offices, restricting the government employees with authority to speak to the media, demanding that all questions be submitted in writing, taking a long time to respond to questions, offering answers of little value, and completely ignoring some questions, are the common features in a long list of grievances submitted to this audit.

## CHAPTER 4

### ACCESS TO INFORMATION

#### 4.1. Background

Governments are Australia's largest repositories of information. Information held by government agencies is a national resource and has been created at public expense for use in the conduct of public functions. Access to information promotes accountability and has important economic and social effects:

*Information is the currency that we all require to participate in the life and governance of our society. The greater the access we have to information, the greater will be the responsiveness of our governments to community needs, wants, ideas and creativity. Alternatively, the greater the restrictions that are placed on access, the greater the feeling of "powerlessness" and alienation.<sup>1</sup>*

The free flow of government information is an essential element in a democracy.<sup>2</sup>

In its report on the State of Print Media,<sup>3</sup> the Australian Press Council says:

*It would appear to be axiomatic that the free flow of information about matters related to government is an essential element of a liberal democracy.*

*In fact, the High Court has identified an implication in the Australian Constitution of free speech in matters related to politics and elections. However, the trend would appear to be away from the free flow of information towards more restrictions and secrecy with governments of all colours trying to use their control of information to set the agenda. In this regard the current [Howard] federal government would appear to be the trendsetter.<sup>4</sup>*

Writing about America, David Banisar<sup>5</sup> contends:

*[O]penness (in government) is essential to ensuring that government is working on behalf of its citizens. Individuals have the right to know either from officials, through organisations or their elected representatives. ...The information held by the government is owned by the American people and only held in trust from them by the government and its officials.*

This is equally applicable to Australia.

He states the benefits of openness as:

- Limiting misinformation and promoting awareness and trust in government;
- Fighting corruption and mismanagement;
- Preventing abuses;
- Promoting government efficiency;

- Helping individuals protect themselves;
- Promoting scientific innovation and development;
- Being an alternative to regulation; and
- Improving the stability of markets.

Many journalists and commentators in Australia would and do echo Banisar's observations and criticisms.

In 2007 three books or essays were published about the alleged attempt by the present Federal Government to stifle debate by controlling the flow of or even distorting government information: David Marr's *His Master's Voice: The Corruption of Public Debate under Howard*;<sup>6</sup> Clive Hamilton and Sarah Maddison's *Silencing Dissent*<sup>7</sup> and Frank Moorhouse's *The Writer in a Time of Terror*.<sup>8</sup> There have been a number of responses to these writings, most notably by the Attorney-General, Philip Ruddock, the Secretary of the Department of Prime Minister and Cabinet, Peter Shergold, the CEO of News Limited, John Hartigan, some academics and columnists in daily newspapers.<sup>9</sup> There have been some press articles and opinion pieces over the year variously referring to these publications. Bob Burton also published a book called *Inside Spin*<sup>10</sup> about the PR industry. The topic of "spin" has been raised often by journalists in our research which can be seen from their submissions reproduced below. "Spin" is also dealt with below.

Despite the growing concern about secrecy in government, it is clear that the freedom to express dissenting views in publications or debate is not controlled by government, unless they fall foul of censorship rules (which arise largely under anti-terror related legislation).

#### **4.2. Availability of and access to information**

Government policy documents at all levels commit to providing government information to the widest extent possible. However, honouring that commitment is subject to the government's discretion. Unfortunately there is mounting evidence that the lure of political advantage increasingly trumps principles of democratic transparency in the exercise of discretion to withhold or bias the release or terms of access to government information.

An analogy for the release of government information can be drawn with the duty of a prosecutor to a court. The prosecutor is obliged to place before the court all relevant evidence in their possession, both incriminating and exculpatory. Likewise a government has an obligation to place before the court of public opinion all information on an issue (both favourable and unfavourable to the government), unless it can mount a credible claim of public interest immunity about specific items (for more on this immunity see below).

Over the past decade the commitment to information access has been a key element in the development of web-based information and the encouragement of e-government.

Policy is framed in terms of increasing transparency, responding to community demand and improving accountability.

Some types of information require protection from disclosure on the web or through other means. In addition to privacy and commercial interests, some information of potential security significance also needs protection. Government policy statements seek to strictly limit classes of documents not available on security grounds: policy “is to keep security classified information to the necessary minimum.” Over-classification limits information available to the public and is undesirable because “it imposes unnecessary, costly administrative arrangements and may bring classification and security procedures into disrepute if classification is unwarranted”.<sup>11</sup> In a report in 2000, the Australian National Audit Office found that all organisations audited incorrectly classified files, with over-classification the most common occurrence.<sup>12</sup>

In NSW, the Premier has issued guidelines to government agencies and state-owned corporations about the classification of “security sensitive information”.<sup>13</sup> In his memorandum, he says the guidelines may assist organisations to “determine if information not previously classified is now considered security sensitive. Information may be considered security sensitive information if, through unauthorised or inappropriate disclosure or misuse it:

- may cause harm to a government department, a law enforcement agency or any person or organisation in NSW.
- may affect the operation of NSW Critical Infrastructure.
- may cause harm to Australia’s national security”.

The policy does not include any further assistance on how an agency or corporation might apply these guidelines when classifying or re-classifying information. “Harm to a government agency” is open to a wide range of interpretations.

Journalists’ comments to us, as set out below, talk about difficulties in obtaining information generally. Some examples of information that is not available as a matter of routine which arguably should be include the following:

- Legal advice received by the Federal Government concerning the legality of its decision that Australia should join the invasion of Iraq.
- In most states, comparative data about school performance is not disclosed. In some cases, for example NSW, specific legislation prohibits disclosure of any data that can be used for the purposes of comparison. The Federal Government has undertaken to release comparative data, but has only just started to collect information from national testing.
- Global amounts paid for school funding under various programs and a myriad of special grants by state governments do not provide details of amounts paid to individual schools.
- Comparative information about hospital performance is not published.
- In October 2007, *The Age* noted that the Victorian Government had so far failed to deliver on plans to publish quarterly reports of ministers’ overseas travel costs, and the identity and remuneration of people on government boards.<sup>14</sup>

### **4.3. The internet and government information**

The internet is now used to provide access to a wealth of government information. There are hundreds of websites maintained by government agencies, and ministers usually have a website that may contain speeches and news releases. Proceedings in parliament, legislation, decisions of courts and tribunals, and some information about aspects of government administration (for example annual report, budget details, policy and program documents) are readily available on the web.

In the UN World Public Sector Report 2003 Australia was ranked 3<sup>rd</sup> in e-government and the quality of its government websites.<sup>15</sup>

However, despite efforts by central government agencies (at the federal level the Australian Government Information Management Office and its counterparts in the states) there are large variations in the quality of content and accessibility of information through websites. Surveys of government websites indicate inconsistency and fragmentation in design and means of navigation.<sup>16</sup>

A survey of 10 federal websites published in February 2007 found that agencies complied with 69 per cent of generally accepted usability principles. The Commonwealth Ombudsman topped the score with 74 per cent while the Government's single entry point for information about counter-terrorism<sup>17</sup> was rated last with 59 per cent.<sup>18</sup>

A conference organised by the Australian Library and Information Association in 2005 ("Digital Amnesia: Challenges of Government Online")<sup>19</sup> identified a wide range of problems emerging as governments move towards publication online, including the need for urgent attention to the loss of information and publications posted on the web. Permanent retention of such documents and access issues have still to be dealt with.

Many government websites appear to be providing information on the "build and they will come" principle, without regard to user needs or the ability to search the site.

Much of the emphasis in the development of government online publication and service delivery is on customers who use the services of a particular agency. While this emphasis is commendable, there appears to have been limited attention given to those who seek access to government websites for the purposes of policy research or accountability.<sup>20</sup>

Journalists' experiences in submissions to the audit confirm that this issue limits access to information through the web on a wide range of important government topics.

A Canberra journalist comments on information available through websites:

Websites have a lot of information. But much of it is hard to search. On some sites (e.g. Defence) if you put in a query you do not necessarily get the hits in the latest chronological order. It is hard to work out what order they are arranged in.

Similarly, while the Parliament website has a ton of information, it is difficult to search.

It is essential that departments keep available information from a previous government. If, for example, there is a change of government, many departments will take down information related to the previous government's policy. This is because it does not correspond with the incoming government's policy. They will also take down information that shows the previous government in a good light. But journalists need the history. We need to be able to readily access the old media statements by ministers and the old policy positions. These should be kept on the sites as "archived" material.

If the departments are restructured, with say regional development going from the Transport Portfolio to the Industry Portfolio, much information is lost. The inheriting department does not see it as its job to put up the information as it was not responsible for its creation. On the other hand the old department thinks that it has no responsibility for this information and therefore it takes it off too. We need to know where it can be accessed.

Another journalist comments that the information contained in government web sites is usually quite detailed and appropriate for general use. The problem is the information is controlled and disseminated in a way that suits a particular department or agency. You won't find any information that they don't want you to find. You won't find any startling new revelations; only controlled information usually formulated in response to previous media inquiries. As a tool for investigative journalism the information provided is often of little value.

One thing to note, however, is that publicly available information through technology will not necessarily give the media and the public background on how and why a government came to a policy decision and what alternatives were presented or considered during the course of that decision-making. The other observation is that, in deciding to put certain information on publicly available web sites, for example, the government is choosing, to some extent, what it wants the public to know.

#### **4.4. Public interest immunity<sup>21</sup>**

Public interest immunity has been relied on by government agencies, under both the common law and the uniform evidence legislation, to refuse to provide documents or give evidence in court proceedings on the basis that it would be contrary to the public interest to do so. The claim is also made by the government on occasions to refuse to release documents to or answer questions from MPs. Claims to public interest immunity differ in the way courts and parliaments treat them.<sup>22</sup>

The general rule, as enunciated in *Sankey v Whitlam*, is that the court will not order the production of a document, although relevant to the proceedings, if it would be injurious to the public interest to disclose it.<sup>23</sup> Some well-established grounds for immunity claims include prejudice to legal proceedings, invasion of individual privacy and damage to commercial interests.

Research carried out for the audit by the legal firm Freehills identified whether there had been an increase in the number of public interest claims by government agencies and whether there had been any recent major cases. Having reviewed the case law on executive privilege/public interest immunity, there was no discernible increase in the number of public interest immunity claims made by government agencies in the context of judicial proceedings. Similarly, there is no evidence of a greater preparedness on the part of the courts to accept novel or unprecedented<sup>24</sup> claims of public interest immunity made by government agencies. The absence of any identifiable trend is perhaps understandable, given, as the Australia Law Reform Commission has noted, issues of public interest immunity are estimated to arise in less than 1 per cent of cases that are before the courts.<sup>25</sup>

From a review of the limited case law that exists, it is apparent that the courts have continued to approach the issue of public interest immunity by engaging in the usual exercise of balancing the extent to which harm would be done to the public interest by the production of the documents against the extent to which the administration of justice would be frustrated or impaired if the documents were withheld from a party to the litigation.

However, given the extent to which the issue of terrorism and national security has captured the public debate over the course of the past decade, it is likely there will be a renewed focus by the courts on these issues. To some extent we have witnessed this already, where in a number of high profile cases<sup>26</sup> the courts have emphasised the importance of protecting national security in considering public interest immunity claims. We discuss the impact of anti-terror legislation in Chapter 7, but the impact of the legislation on the criminal and civil justice systems remains to be seen.

Public interest immunity claims also extend to the functions of government. One way of ensuring accountability of government is scrutiny and review by upper houses of Parliament (except in Queensland and the territories which do not have upper houses) of legislation, appropriation Bills and larger government contracts, to use a few examples. A lot of this is done either on the floor of the house or in committees, in which the major parties and independents participate. This process also helps the greater flow of information through Parliament to the public, usually with the media as the vehicle.



The practice of the Federal Government, particularly since it gained control of both houses of Parliament, has been roundly criticised.

The clerk of the Senate, Harry Evans, refers to the change in July 2005 to a lot of the accountability measures when, for the first time in more than 40 years, the Federal Government had control of both Houses.<sup>27</sup>

The Senate has traditionally had the role of scrutinising the activities of the government, particularly the executive. It does so principally through debate in the Senate of legislation and inquiries of government activities and its law-making functions (e.g. Senate committees). For many years, until 2005, the overriding principle governing the provision of information from the government at the request of the Senate was a genuine claim of public interest immunity.

According to Evans, in 1994, under the then Labor government, the Leader of the Government in the Senate told the Senate Privileges Committee that the government would not refuse to give the Senate information unless there were carefully considered public interest grounds.

He says the Howard Coalition Government does not operate this way. It often refuses to give the Senate information on spurious public interest immunity grounds or for no reason at all. This occurred under this Government even before it gained its majority in the Senate. Since 1 July 2005, only one motion for the production of documents has been agreed to. At first some reasons were given for refusing to produce documents—usually that the document had not yet been published—but most motions are rejected without reasons.

Evans says it's not possible to give a full list of refusals to answer questions in Senate committee hearings because they are too numerous or take many forms. For example, he says a question may be taken on notice and then not answered at all.

Annexure A lists the documents the Government has refused to produce since 1 July 2005. Annexure B is a select list of refusals to provide answers to questions or information to committee hearings, without either stating the grounds of refusal or on grounds which are not recognised public interest immunity grounds.<sup>28</sup>

The public interest immunity “privilege” operates in other jurisdictions. The NSW Legislative Council (the upper house) has power to get access to information by ordering the Government to produce documents. The power is based on the common-law principle of “reasonable necessity”,<sup>29</sup> which was confirmed in the line of cases known as the *Egan* decisions between 1996 and 1999.<sup>30</sup> The Clerk of the NSW Legislative Council, Lynne Lovelock, notes that, since these decisions, the Government has generally complied with orders for the production of documents. There have been few instances when the Government has challenged the House's right to government documents, although it has taken a narrow view of its obligations to comply with orders when an order was made before the prorogation of parliament and in relation to Cabinet documents. Annexure C lists the orders on which the Government has claimed privilege and those claims which were disputed.

In Victoria, the Government does not have a majority in the Legislative Council. It has to date refused to respond to a resolution calling for the tabling of documents concerning gaming licences. The Government claims that secrecy provisions in a statute limit its obligation to disclose information to the Parliament.<sup>31</sup>

A media lawyer made the following comment generally about disclosure of information:

The existing principles of public interest immunity, if applied appropriately, identify the correct issues and limits. The difficulty lies because there is a culture which has developed within government and government organisations that they must prevent disclosure of anything other than the most routine information. They have lost sight of the public nature of their role and the legitimate interest of the public in the workings of government and government organisations.

Dr Kate Burton says that,

*“As well as claiming immunity, officials commonly avoid divulging information by referring questions to a senior officer or the minister, taking questions on notice and not venturing information. A former committee chair has written that: ‘If they do not ask the right questions, [they] will not get the right answers’. Other recent examples of the means by which departments and executive frustrate the ability of committees to obtain information highlight other obstructive techniques.”*<sup>32</sup>

She uses the following example, which is commonly known as “The Children Overboard” incident:<sup>33</sup>

... the executive instructed departments not to provide submissions to the inquiry into “A Certain Maritime Incident” (CMI), which investigated events behind a 2001 incident. An Indonesian vessel was intercepted by the Australian navy in Australian waters; asylum seekers aboard the Indonesian vessel were reported to have thrown children overboard. In virtually all inquiries individual departmental submissions form an important basis on which committees frame their investigations. During the CMI inquiry, however, at the Government’s behest there were no such submissions. This was a significant handicap for the inquiry and raised broader issues of executive dominance and accountability, according to the committee’s report:

*The Government directed Commonwealth agencies not to provide submissions to the committee. Such an action is almost unprecedented and contravenes the accountability obligations of the executive to parliament.*

For a related inquiry into accountability arrangements for ministerial staff (the “MoPS inquiry”), the Department of Prime Minister and Cabinet insisted on a whole-of-government submission, again limiting the information available to the committee. Several people interviewed suggested that this approach allowed the Prime Minister’s Department to vet departmental submissions, thus ensuring control over what information the committee received.

The refusal of officials, especially heads of departments, to appear before committees or the refusal of ministers to allow them to appear—as occurred during the CMI inquiry—is another trend in recent years which makes the scrutiny work of committees more difficult.

Aside from issues arising from the operation of Freedom of Information legislation and practices around Australia and the effect of anti-terrorism laws (which are dealt with in Chapters 5 and 7 respectively), there are claims and examples from journalists and comments in the literature about a growing level of secrecy in governments at all levels.<sup>34</sup>

We have concentrated in this chapter on journalists' experiences of obtaining access to government information. We also look at the means by which it is said that governments control the flow of information. Practices of governments affect the media's knowledge of government actions and decisions which, in turn, may affect the public's right to know.

#### **4.5. Journalists' experiences in obtaining information from governments**

Overwhelmingly journalists complain that they are denied access to information, particularly background information about how a government decision has been arrived at. They complain that the flow of information is controlled, largely because of the centralisation of the source of government information. In what now appears to be the majority of cases, public servants generally are prohibited from giving journalists information directly. They are either referred to the department's media section or the responsible minister's office. Their experiences and comments provide a telling account of the flow of information from governments at all levels. We set out a number of comments from journalists across the country. Save for some slight editing, the words generally are reproduced verbatim.

We have, generally, arranged the journalists' responses into the topics they deal with.

##### **4.5.1. Secrecy generally**

- Over the past 15 years government management and secrecy has increased markedly. Governments, ministers, their minders and their departments want to keep a very rigid control over the dissemination of information. Increasingly, the media has to rely on "leaks" to get details behind major decisions.
- There is also very strict control of the release of government and departmental reports. Eventually, many are released, but not in a timely fashion.

*SA Journalist with 35 years' experience*

- It is getting harder and harder for media organisations to get to the truth. In Queensland, the (former) Beattie government has made getting a statement from a department akin to squeezing through the eye of a needle—insisting that only a handful of people can comment. Since most of the people empowered to deal with the media are in Brisbane, they are removed from the impact of regional issues and the quality of information is diluted. The difficulties involved in building relationships with public relations officers and managers operating from metropolitan areas have themselves become a challenge to free speech. Whether by accident or design, these PR arrangements are particularly challenging for young journalists to navigate around.
- Regional media is often stalled in getting information about government reports because PR officers claim information relevant to specific areas is not available. Delays of weeks or months can occur. The journalist has no real way of knowing if they are being fobbed off, or there is a real reason for the hold-up. Of course, by the time the PR person provides the information, the story is probably stale.

*Some smaller newspapers and local and regional media journalists*

- Community newspapers regularly deal with local governments. At times many council meetings are closed to the public, and the media. Often young reporters are expected to wait in the cold, or go home, while matters are discussed in camera.
- Personnel issues (such as an allegation of sexual harassment by a senior manager in an inner western Sydney council) and those considered “commercial in confidence” (councils often deal with matters concerning properties they own) are examples of reasons given for having closed meetings.

*Some small local and regional media journalists*

#### **4.5.2. All questions directed to the media unit or the ministers office**

- It has become much more difficult to gain access to information directly from federal public servants, particularly since 1996. This flows from a policy, which has also become the fashion at state government level, to channel all media inquiries to a single point usually in a minister’s office or a public affairs section in a department or agency. Public servants must fill out a form detailing the media contact and send it directly to public affairs. The media adviser usually requires a journalist’s questions to be listed and forwarded via email. This, disturbingly, has become accepted practice in Canberra and in the states.

- While the amount of Federal Government information publicly available is quite significant (if you look at department and agency websites), getting the basics for journalists has become harder with, in some cases, every query from a journalist treated as a potential political issue and passed to the minister's office. The response is usually high on rhetoric and low on substance. Getting information from ministers' offices has not changed, but they are working a lot harder at monitoring the departments and what they get up to.
- Almost gone are the days when you could phone and chat to someone about policy and delineate what was background and on and off the record. Public servants have been scared off doing this with increasing departmental vigilance over phone logs and emails. Since the mid-1990s they have curtailed their contact with media.

#### *A senior Canberra journalist*

- The most pervasive policy is to forbid the media to speak to any public servants. Instead, all media requests for information must go through a departmental or ministerial press secretary. This immediately creates a dynamic where you don't hear what's going on in all sorts of public interest areas (health, education, environment and government service delivery generally) unless a politically minded press secretary deems to offer something, usually in a press release. The media can usually get answers to highly specific questions, but unless you've already found the information through another channel (usually by someone risking their job to tell you things) you won't know what specific questions to ask.
- There is the "all-questions-one-media person" approach. Journalists experienced this with the recent federal intervention in Northern Territory indigenous communities. This was the leading news story in newspapers and the electronic media. It attracted worldwide attention. Yet all questions had to go through Minister Mal Brough's press secretary. No other person was authorised to provide information unless authorised by the media adviser. This led to delays in getting answers, particularly to difficult questions, because the adviser was clearly too busy to attend to all inquiries in a timely manner. She struggled to get information on the proposed quarantining of welfare payments, a key aspect of the Government's intervention.

#### *A journalist in the Northern Territory*

- Two Canberra press gallery journalists said that while they previously dealt with the Department of Immigration's media staff when requesting information, now they must now direct inquiries to Minister Andrews' media advisers. This leads to longer delays and a less productive means of obtaining information.

- A Queensland journalist said “the drama” it takes to get information out of the Health Department is “a joke”. Only when they are opening a new hospital do we get phone call after phone call with information. Hospitals have to offer some protection to their patients and employees, but they need to divulge information when it’s a matter of public interest. In a recent story about a TB incident at a Gold Coast Hospital it was like trying to get blood from a stone. Lack of information only made the public more concerned.
- This same journalist continued that gone are the days you are able to ring a school to write a picture story. Now you must contact the Education Department to write about a child who won a local school singing competition.
- A senior Canberra press gallery member said there had been a strong trend over time from ministers’ offices to centralise control of government information, with often the ultimate control in the Prime Minister’s office. While it used to be possible to talk to public servants and get facts and background—even argue with them about the merits of government policies—they are now very largely unwilling to talk and refer you to the minister’s office. Even if you get to speak to a public servant, they are scared and will almost invariably put a note on file and report the contact. One result is that you are often obliged to get perspectives on policy from outside, e.g. on economics from Access Economics.
- Release of information by ministers and their media advisers is heavily controlled and the details requested can be very difficult to obtain promptly if they are unlikely to result in a positive story. Information that is positive to the Government is carefully managed and it is not uncommon to receive highly critical telephone calls from media advisers if a less flattering than expected story is published.
- Some ministers do not make themselves available for interviews and advisers often attempt to simply send emailed statements to prevent journalists asking questions when a difficult issue arises.

*A South Australian journalist*

- A local newspaper journalist says those in the three levels of elected government - federal, state and local - have created an extraordinary wall around themselves: media officers, public relations staff and press secretaries.

The extent of this often impenetrable barricade reaches down to department heads and officers, all of whom appear to have been instructed to say: “I can’t talk to you. You have to go through our media office.”

This mantra is repeated with a fervour that reflects the level of trepidation behind many comments, such as, “It’s more than my job’s worth to be talking to you.”

- Another journalist—a reporter and editor on regional and suburban papers for 12 years—said there had been a steady attempt by governments of all persuasions to control and channel requests for information through a high-level political process, thereby stifling public debate on potentially contentious issues.

It used to be possible to phone council general managers and government ministers directly to get information and comment, giving journalists, and ultimately the public, a genuine chance to probe them on issues of public interest.

Since the advent of email and the proliferation of PR people in government departments, journalists now have to submit most requests for information or comment in writing, days and sometimes weeks before their publication date. This is problematic, since most papers have daily or weekly deadlines and news, by its very nature, cannot be planned. This practice is seen as a deliberate attempt to hose down or delay media coverage on potentially damaging issues.

There is a trend towards government spokespeople and spin doctors passing media inquiries to different departments and levels of management so the journalist can’t actually track down who is dealing with their inquiry. Invariably responses are received just minutes before (and sometimes after) deadlines, giving the journalist very little time to examine the response and pose further questions. Responses often fail to answer the specific questions asked and are evasive and general.

Regional and suburban journalists face their own specific problems seeking information and comment from state and federal departments which often don’t perceive their publications to be of great significance.

#### *Journalists from some small local and regional media outlets*

- Most police in Queensland require journalists to contact the police media department in Brisbane, even when inquiring about an incident in, say, Cairns. How can a Brisbane-based PR person accurately convey the seriousness of a situation in an area they are not in?
- Similarly a Tweed-based (NSW) journalist was seeking information about a child sex case in the area. The Northern NSW Child Protection Unit at Lismore, when contacted for details, directed him to the Sydney police media unit. The police in the media unit knew nothing about the case and had to go back to the Lismore unit. More than 24 hours later an approved statement was released. It was four lines long and told the journalist no more than he already knew. The Sydney media unit refused to give him any further information.

- The journalist said he was aware of dozens of examples of colleagues being stymied by state governments' policies of only allowing the release of up-to-date, accurate and newsworthy information by an authority's media unit. This happens not only with police but other government departments. This practice protects the police and others from scrutiny, but denies journalists the ability to develop basic skills like gathering information and learning to handle sensitive information and reports. Journalists can no longer pick up the phone and find out about an accident in a small town without being put off for a day or two while a centrally-based bureaucrat gathers some basic information from the local officer.
- In Queensland, journalists can ask questions directly of ministers only in extraordinary circumstances. Requests for information are being directed to ill-informed spin doctors more intent on blocking media reporting than acting as a conduit for the media to do their job quickly, with the minimum of fuss.
- Journalists are denied the right, on behalf of the people who elected the politicians, to ask pertinent and important questions in the public interest. The media are now full of a generation of reporters who don't know how to get information unless it is spoon-fed to them by a PR person.

*A senior journalist on the Gold Coast*

#### **4.5.3. A case study: BOTPA—"Because of the Privacy Act"**

- For many years before 2005, news journalists were able to use legally obtained analogue scanners to monitor emergency frequencies of the police, ambulance and fire brigades. This allowed the media to do its job promptly and efficiently; all detail was checked and reported in accordance with standard procedures.
- In early 2005, Victoria Police advised the media it was planning to introduce encrypted digital radio communication. This would prevent monitoring by scanners. Henceforth, the media would have to rely only on information imparted through police media liaison.
- Victoria is probably the third state to introduce encrypted digital communications, following Queensland and South Australia - and many police forces in the UK and US.
- The media protested against these changes and sought continued access to the police radio system, although accepting that tighter controls would be necessary. A small committee was formed with representatives from HWT, 3AW, Channel 10, ABC and Channel 7. Later, representatives from *The Age*, Leader Community Newspapers and Channel 9 joined. This committee continued to lobby police for general access to the emergency radio network, and refused to accept the offer of a filtered and delayed information feed.



- The police maintained the issue was a legal one. They said the *Information Privacy Act* (Vic) 2000 and the *Health Records Act* (Vic) 2001 prevented them giving the media unfiltered and immediate access to the network, although they refused to provide any legal advice to support this. They also claimed media acting on information from scanners had appeared at crime scenes and compromised investigations.
- The media rejected these arguments, claiming open access to the network only provided it with alerts, and all consequent reporting was done by corroboration and checking, and within the law.
- The media argued important public policy reasons why it should not be denied access. These include police accountability and the media's responsibility to keep the public informed, especially in relation to political and governmental matters. A legal opinion sought by the media rejected the police legal argument.
- Negotiations continued for about 12 months.
- The police and Department of Justice eventually agreed to provide an internet-based scrolling system of police emergency event data to which only accredited media would have access. The feed is still filtered, but only for incidents the media wouldn't report directly anyway (e.g. domestic violence, intervention order breaches, sexual assaults, rapes etc). It is called MATES—Media Access To Emergency Services.
- However, when announcing its compromise, the police said the system would cost \$250,000 a year to maintain, to be borne by media subscribers. The media rejected this, arguing the system was merely an extension of a police obligation to the community.
- On 30 May 2006, the minister agreed to waive any cost to the media for setting up and maintaining this system.

#### *A Victorian Media organisation*

#### **4.5.4. Media management**

- Both the Federal Government and Opposition have sought to achieve strict control of the media in recent years, with this trend exacerbated in an election year. For example, Canberra press gallery journalists are now given short notice of news conferences or where the leaders are travelling. Notice is commonly not given to journalists of where the leaders will be travelling until the day, with “security” commonly cited as a reason for this refusal of scheduling details.
- Even news conferences in Canberra are called with as little as 10 minutes' notice. It has been unofficially confirmed that this is to avoid scrutiny from groups such as ABC-TV's *The Chaser*. It is also designed to force journalists to rush to conferences, giving them little time to

prepare. Journalists were told to expect more secrecy about dates/states/events in the 2007 election campaign.

*Two Canberra-based journalists*

- A Melbourne newspaper journalist says all government departments, ministers, politicians, celebrities and sportspeople are much harder to get access to now because almost all had their own media managers whose job it is to project their client in the best possible way, which means trying to hide anything negative. Most media requests these days go through a media spokesperson so the results are often sanitised. You may not even get to interview the person; you might have to make do with a prepared statement sent by the media officer.
- The Western Australian Government Media Office is known to field journalists' inquiries with responses such as "You're behind the eight-ball" or "That's not an issue". The office sometimes refuses outright to deal with certain subjects.

*A Western Australian journalist*

**4.5.5. Access to information about ministers and members of parliament**

- Information about ministerial travel expenses and the MHRs' and Senators' pecuniary interests register is made available, usually at 6pm on a Thursday or Friday, at the federal Parliament House press gallery boxes. If you miss the hard copy, there is no other way to get the information, especially if you work outside the building. A more structured and accessible release of this kind of information along with usage of retired MPs' Gold Pass privileges would assist transparency. Some years ago the journalist noticed a spouse making regular but unauthorised use of the pass for her own work. Clearly an abuse of the benefit occurred but it was very hard to confirm the circumstances.

*A senior Canberra journalist*

- The MPs' and Senators' Register of Interests is readily available at Parliament as long as an appointment is made. However, availability is limited for those based outside Parliament House. Records are also made of which journalist viewed the reports and the documents they photocopied, so any long-term investigations are not discreet.
- Allowances, such as food and drink costs, are not publicly available. This would be a helpful addition to current information about expenses and would increase transparency in political dealings.

*Two Canberra-based journalists*

#### **4.5.6. Budget papers**

- Budget papers hide, rather than reveal, information about operations. The outcome, output, structure is confusing even to those who are inside. Typically most federal departments will say its outcome will be “a stronger, sustainable and internationally competitive Australia”. This is meaningless drivel. Try to find out from the budget papers exactly how much is spent on a particular year on a particular area. Often you can’t. Even the people who run the departments can’t tell you.

*A senior Canberra journalist*

- Another journalist says just the format of documents can affect access to information. For example, the format of the annual budget papers changed some years ago which makes it much harder to work out just what the Federal Government is spending.

*A senior Canberra journalist*

#### **4.5.7 No information available - try FOI**

- Two Canberra-based journalists say that, with state issues such as public health and performance of South Australia’s hospitals and public schools, information commonly has to be requested through Freedom of Information. Previous FOI requests have had to be made on a state level to receive information such as emergency department waiting times, crimes/assaults on public school grounds and public school bank account levels.
- A South Australian journalist says there are also occasions when the only way to obtain information that should be easily accessible is to put in an FOI request. This followed after a request for some straightforward statistics from the SA Police Minister’s media adviser, who referred the request to the Police Commissioner’s office. After a complaint about delay in getting information, the journalist was told to put in an FOI application—which delayed the matter further.

#### **4.5.8. Issues with particular organisations**

- The federal Public Service Commission collects information on a wide variety of subjects over each financial year. If, after June 30 you want information on one of these areas—ranging from indigenous employment in the service to breaches of internet regulations—typically you will be told they will not be available until November when the whole report is released. If I have a specific question, and they have already collected the information sought, why can’t they release it?

*A Canberra journalist*

- Several NSW Government departments are difficult to deal with in terms of accessing information. Among the worst are the Education Department, the Roads and Traffic Authority and NSW Police. The RTA will not handle any inquiry unless it is submitted by email. The Education Department closes ranks whenever there is a negative situation affecting schools. They are very quick at sending out media releases relating to funding or stories with a positive political twist, such as a visit by the Education Minister, but it's next to impossible to get comment when there is a school brawl or similar. Principals and teachers are not allowed to talk to the media about such incidents but are freely available when it suits departmental spinning.
- Local police stations are a constant source of frustration for journalists. Unless you have contacts at each station you have little chance of gaining meaningful information each day. You are routinely referred to the media unit in Sydney and so begins another round of bureaucracy. The media unit usually isn't aware of the incident of interest and waits until the station concerned submits a report. Unless they regard it as a major incident the media unit will not make direct inquiries to the station for you and if they regard it as a major incident, they will step in and take control, disseminating information at their own pace.

#### *A television journalist in regional NSW*

- Insisting information comes through the PR unit allows an organisation to issue a few sentences on a story, despite the journalist having asked a long list of questions. For example, Queensland Health actually has PR officers in some regions. But journalists still try to ask their questions as early in the day as possible because it takes hours for the response statement to be released by the department. This delay makes it extremely difficult for the journalist to ask follow-up questions on elements that have been ignored in the statement.
- Another difficult agency is Queensland Workplace Health and Safety, which only allows one or two people in the state to talk on a topic.
- Education Queensland controls information to an alarming level, insisting that all comments about "hard news" stories come from the regional manager. The journalist believes that a year ago principals were warned about making any comments to journalists about these stories. As a result, it became extremely difficult to investigate such stories as bullying and vandalism relating to schools.

#### *Journalists from some smaller newspapers and local and regional media organisations*

- Figures were sought from RailCorp on the number of people fined as a result of a fare evasion blitz. The response said only that the number of fines issued was at the expected level for an operation of that size. RailCorp refused to release the numbers although, in the past, they have sometimes been provided freely or through FOI.

*A Sydney journalist for a free, wide-circulation newspaper*

- A Northern Territory journalist says the Federal Government put out a release about funding the eradication of certain weeds. She wanted to know if any of these weeds were a problem in the territory so she could decide whether to disregard the release. She rang the territory's Environment Department but no one would say which weeds were a problem or where that information might be available. She was referred to the department's PR officer, who was away that day. Despite this, no one would tell her which were the problem weeds.
- A Melbourne journalist needed comments from a police officer on her area of expertise. Despite having her phone number and talking to her, the journalist had to submit questions to the officer via the Victoria Police media unit and both the questions and answers had to be in writing and vetted before release.
- A NSW journalist said, following a serious incident in a NSW school, the Education Department refused initially to comment. Only after several hours of pressure applied by all media, did the department release a printed statement. On another occasion the department refused to release details of a racist e-mail campaign aimed at children of ethnic origin. Following continued pressure from media organisations, the department again released a written statement denying any racist overtone, despite evidence to the contrary. The Minister was made available several days after the incident, again to play down the situation.

#### **4.5.9. Examples of delays**

- A journalist was chasing a report about the reasons for patients discharging themselves from Northern Territory hospitals against medical advice. The issue had arisen in a coronial inquest. The practice adds costs to the health system because people often return in a worse state. She was told about the report in August 2006. In November she was told it was going to the minister and would be released soon. In March and June 2007 she was again told it would be released soon. In August 2007 she was told it was old news and had been up on a university website for months. She wasn't told it was publicly available in July/August when she asked for it.

- A Northern Territory journalist sought the latest figures on waiting times for elective surgery. Months of to-and-fro ensued before the Health Department told her they would not give her the figures because they didn't want them reported in the wrong way.

#### **4.5.10. Other problems with getting access to information**

- Privatisation and outsourcing of work that was once the domain of the public sector has made it harder on occasions to find out what is going on; for example, whether a project is being completed on time, compliance etc. Often a journalist's request for information will fall into the "commercial-in-confidence" basket of a private company or "Cabinet-in-confidence".
- Gathering information, for example, about the contracting out of the operation of immigration detention centres is almost impossible, especially if you want to check claims that access to psychological treatment is no longer guaranteed.
- The increasing politicisation of the public service, since the 1980s, has meant it is now rare to see stories about the advice given to a minister by the department.
- Last year the Howard Government raised the threshold for identifying those making donations to political parties from \$1500 to \$10,000. So anyone donating \$9,999 to a political party can remain anonymous. This change reduces public knowledge and political transparency.

#### *A senior Canberra journalist*

- The Federal Government is releasing a lot less than it used to and is making it harder for journalists to get access to basic information that might be unkind to its record. While expected of any government, the present Federal Government has turned it into an art form. The "children overboard" scandal was the perfect example of lying to the public before an election and doing whatever it could to prevent people from learning the truth until after the Government was re-elected.
- Other methods to control information include initiatives such as the Prime Minister's weekly radio address. It is emailed to journalists with a 2am or 3am embargo, so journalists can't seek responses from Labor or lobby groups.
- Use by both sides of information "drops" to favoured recipients is another example of how the major parties try to manage information.
- Departmental reports are often media-managed.

- The recent case of Indian doctor Mohamed Haneef exemplified a poor flow of information. Immigration Minister Kevin Andrews released selective information about the AFP’s investigation of the doctor. This left journalists and the public having to trust that their government is not distorting the facts.

#### *Two Canberra-based journalists*

- There is also an increasing amount of shoving of responsibility for comment and actions between ministerial and departmental offices. Department officers are sometimes loath to release information, especially “good news” for fear the relevant minister wants to be the bearer of good tidings. Repeatedly—especially in portfolios such as the environment—ministers are fronting the cameras for the soft, furry animal stories but leaving it up to their departmental experts to take the flak for issues such as fire management and pollution disasters.
- Political and business lobbying is a fact of life but some journalists believe a WA-style register of lobbyists should be extended to each state and federally.

We have not reproduced all submissions we received from journalists. They bore marked similarities to each other, particularly in relation to the difficulties of getting information quickly, accurately or at all from many ministers, government departments and others. In most cases the journalist is referred to a centralised media office or to a media adviser in the minister’s office. Most complain about the delay and the paucity and quality of the information provided. Overwhelmingly they say that information positive to the government or the portfolio will be issued willingly but that they meet resistance when seeking information about more substantive issues.

Across Australia the departments and/or ministers from which the media has the greatest trouble in getting information are:

- Police
- Health
- Education
- Public transport.

Public servants are either forbidden from or fear making information available or discussing certain issues with members of the media. Responses we received show this happens across all states and territories and federally. However, the Federal Government is repeatedly singled out as the worst in controlling information or refusing to release it, except in its most basic form.

#### **4.6. Other examples**

Academic Helen Ester has written about the experiences of some of the Canberra Press Gallery’s more senior journalists whom she interviewed during her research.<sup>35</sup>

Ester interviewed 24 senior gallery journalists during 2003-2004. Some results are referred to in her chapter on “The Media” in Hamilton & Maddison<sup>36</sup> but later research and as yet unpublished writing by her expand on this chapter. The results suggest that, by using certain methods of providing information to the media, politicians (especially the Prime Minister and ministers) are damming or limiting the flow of information to the public. Some practices referred to by journalists follow.

#### **4.6.1. All-in news conferences**

Traditionally in the Westminster system, politicians (particularly members of the executive) held what are described as “all-in news conferences”. Representatives of media organisations were allowed to question politicians until all questions were exhausted. Ester relates the history of the demise of the news conference. Labor leader Gough Whitlam undertook to hold weekly conferences. Labor Prime Minister Bob Hawke asked that the new Parliament House contain a space for media conferences and the “Blue Room” came into being. In what Ester describes as an illustration of “the executive’s capacity for wilful change”, Prime Minister Paul Keating changed the practice to be more akin to the type of conferences held by the President of the US and the White House press corps. He started to have conferences on the executive courtyard outside the Prime Minister’s office, a practice she says that has been adopted and “refined” by Liberal Prime Minister John Howard. The process has been described in Ester’s work:

*[The Prime Minister] walks out the external door of his office suite’s lounge room and stands on the steps, bringing his podium and Australian flag with him. This allows him to cut off proceedings whenever he chooses, simply by turning around and walking back into his office (Alan Ramsey, SMH, 2006).*

Senior Canberra journalists say the news conference system has become increasingly worse under the Howard government. Gallery journalists complain that a conference in the style described is short and does not allow free-ranging questions to be asked. The politician will say what he/she wants to say and not allow questions or provide only trivial answers. The media is usually given short notice of a conference, allowing journalists little time to prepare and formulate questions. Some journalists interviewed by Ester say that certain media representatives are selected, rather than all journalists being given the opportunity to attend. This style of conference gives the politician the opportunity to side-step important issues by giving “soft” answers. In the words of one journalist, the present type of conferences is “... not submitting yourself to scrutiny”. One senior journalist described it as “government by announcement”.

One example was, Ester says, “universally condemned”. A conference was called by Prime Minister Howard to answer questions about allegations of bribes paid to Saddam Hussein by the Australian Wheat Board during the UN’s food-for-oil program. The conference was to defend the Government’s lack of awareness of what the Australian Wheat Board had been doing. The conference lasted 15 minutes before the Prime Minister shut it down.

Ester says “(c)urtailing and controlling press conference questioning blunts a key newsgathering tool and creates palpable discontent among Canberra journalists”.



#### 4.6.2. Doorstop conferences

According to Ester, these informal conferences happen when media question politicians as they are about to enter Parliament House. In the old Parliament House there were regular opportunities for interaction because all entrances were publicly accessible. These declined after 1988 when Parliament moved into the new, permanent building. With new security and entrance arrangements, a politician can now avoid meeting the media at the door. When they do meet, it is intentional. The media are advised beforehand they will occur. She said:

*Thus manufactured images of casual faux spontaneity endure and provide on-going opportunities for spontaneous “spin” and fodder for the twenty-four hour news cycle. They inevitably produce short pre-prepared sound and vision “grabs” largely bereft of solid political information and hard questions are avoided by politicians simply entering the building.<sup>37</sup>*

One journalist who Ester interviewed said the media got the same politicians every time, not the ones they really wanted to talk to. You also just get reaction, not stories.

#### 4.6.3. Talkback radio

According to Ester, Canberra-based journalists complain of the trend of Prime Minister Howard to use talkback radio to their detriment. Mr Howard’s apparent close connection with the conservative Macquarie Media broadcaster Alan Jones is of particular note. These and other broadcasts allow politicians to make political statements without close questioning by political journalists. One journalist described them to Ester as easy avenues to reach a mass audience without facing “more difficult or less convenient questions on the national agenda”.

Technology allows the broadcast to be easily transcribed to print and the interview is sometimes recorded for television. Canberra journalists often get only the transcripts—indeed, in the past decade that has been all they have got. The executive will not allow follow-up questions or clarification by journalists. The journalists interviewed by Ester overwhelmingly consider the greater use of talkback radio as a means of delivering a political message to be a worrying development that centralises the flow of information.

Other means seen by senior journalists of controlling the flow of information and dissuading questioning have been the use of background briefings to selected journalists and restricting the journalists who travel with the executive. Ester also talks about the relationship between governments and publicly funded media, particularly the dominant ABC. She also discusses the “rearrange[ment] of relationships” between politicians (particularly the executive) and the media which has occurred largely since the permanent Parliament House opened in 1988. In the old Parliament House, the media and politicians mingled easily and often. The members of the Press Gallery were able to more informally get information, impressions or reactions and develop relationships with the politicians. Now there are physical barriers to interaction. One journalist says everyone is “quarantined”, there are separate entrances and people and politicians are kept apart. Technological changes

have also decreased the contact between the media and politicians as did the closing of the non-members' bar, which operated as a hub for interaction.

In conclusion, Ester describes the changes in the circumstances in Canberra as a "covert exercise" in controlling the political media. She says there is a measurable decrease in opportunities for discussion and questioning with not only the executive, but its staff and public servants.

#### **4.7. Spin**

"Spin" refers to a major element of the work of public relations (PR). It describes how someone puts a slant or twist on information as they present it. Spin is normally imparted by exaggeration/understatement and subjective selection of facts. Spin is usually distinguished from outright lies, but is designed to ensure the recipient of information receives an impression that is at variance from the unvarnished truth about an issue known to the spinner (or those on whose behalf they act). Such variance is calculated to advantage the spinner and to that extent usually disadvantage recipients. The news media and wider public are likely to be exposed to some degree of spin with every presentation from a politician in a parliamentary debate, an industry spokesperson in a television interview, or a corporation in a news release. Spin, or at least effective public relations, is a fact of life for the public, private and non-government sectors.

However, spin has always been an inherent element in advocacy of all sorts, and the freedom to practise it is an essential part of democracy. Therefore, rather than making what would be futile attempts to eliminate spin, the most practical approach is by analysis, to bring it out into the open and, where necessary, counter or rebut it. Of course, that analysis will be helped by widening access to such processes as FOI.

It is natural for a government agency or corporate entity to want to co-ordinate how it portrays its public face to best advantage, given the politics of government and commercial imperatives. We cannot expect every public servant or corporate employee should be free to represent their employer publicly on any topic they wish. As well, much of what counts as PR are relatively harmless attempts to grab public attention for some commercial event or product through positive media coverage. The role of PR may at times even serve the public interest: in the event of natural disasters we expect a certain skill in crisis communications from government officials, just as we want health authorities to emphasise the health risks of certain behaviours like smoking tobacco—although in the long run exaggeration can often be counterproductive in such matters.

Yet we must balance these aspects of PR with the need for governments—and to a certain extent corporations—to live up to proper standards of public accountability. It should not be acceptable for a government to manipulate public debate by conveying merely what it wants people to know, rather than what they should know so the public—especially as voters—can properly assess their performance.

The Australian Press Council argues that "special care to avoid being hostage to deliberate spin should be the stock in trade of journalists".<sup>38</sup> This is because spin makes it difficult for journalists to perform their desired role as a public watchdog:

every time someone else selects or sorts information for the news media, that person can add a spin or bias to it that may not be detectable, yet may determine how that information is understood and interpreted. Spin can limit the capacity of a journalist (especially if less experienced)—or an ordinary citizen for that matter—to freely explore and evaluate original information, such as database records or policy documents, or even talk directly with officials with expertise about that information.

Freelance journalist Bob Burton, who has written extensively on the role of spin in Australian society, describes a PR industry that has grown significantly in both the public and private spheres over recent years. One Melbourne newspaper journalist told this audit that all government departments, ministers, celebrities and sportspeople were now much harder to access because “almost all have their own media managers whose job it is to project their client in the best possible way”.

The extensive use of PR consultancy firms and in-house PR sections in government is notable because Australian political leaders once dismissed the idea of employing the services of private PR firms to help in public duties. The reason put forward by one department secretary in the Menzies Government was: “The task of interpreting a nation demands full-time specialisation, undivided loyalty and undivided responsibility”.<sup>39</sup>

Burton now notes a troubling trend in which the use of sophisticated PR strategies is not only pervasive in public life, but is invisible as well. “Most PR consultancies operate on the basis that they are most successful when they are nowhere to be seen,” he writes.<sup>40</sup> Whether the work of PR involves tutoring client spokespeople, behind-the-scenes lobbying or covert advocacy campaigns to promote special interests and limit rival points of view, the existence of PR is largely hidden from public view. Consultancies, furthermore, often refuse to identify the clients behind public communications campaigns, a trend unfettered by a self-regulatory code of ethics that is weak and hard to enforce.<sup>41</sup> Yet the proliferation of these invisible PR forces, which most often serve the interests of deep-pocketed corporations and governments, is said to have an increasing impact in shaping public debate. “If the only voices we hear in public debates belong to those with enough wealth to fund PR campaigns, and clandestine campaigns at that, our democracy will be all the poorer for it,” writes Burton.<sup>42</sup>

Unlike the corporate sector, government agencies are subject to parliamentary scrutiny and their records are potentially accessible through freedom-of-information laws. But in submissions to this audit noted above, journalists have described the pervasive use of spin by government agencies and how it affects their work.

A prominent recent example given to the audit is how the Federal Government presented the case of Mohammed Haneef, an Indian-born doctor from the Gold Coast. Dr Haneef was detained on suspicion of involvement in terrorist activities on the basis that he had given his mobile telephone SIM card to a relative in the UK. That person had been implicated in the attacks in London and Glasgow in June 2007. After the arrest of Dr Haneef, state and federal ministers as well as the police were quick to release information about the cause of the arrest. Some of this evidence subsequently was shown to be misleading or untrue. As the Australian Press Council has noted,<sup>43</sup> many journalists relied on the information given publicly and “off the record” by

official sources. But it was many days before that material was challenged—namely, when Dr Haneef’s lawyer disclosed to a journalist a transcript of the police interview with his client. When Dr Haneef finally appeared in court, the magistrate found the Government’s case so unconvincing that bail was granted despite the charges relating to terrorism, and eventually the charges were dropped.

In other areas of major public controversy—children overboard and the SIEV-X incidents in 2001, the decision to commit troops to Iraq in 2004, and the AWB oil for wheat scandal—the Government asserted it had acted on the basis of best intelligence available and used this to justify its policies, responses, or in the case of AWB, inaction. As James Cotton observes, classified and unchallengeable intelligence information had been used on some occasions to support the Government’s account of events.<sup>44</sup> Subsequent inquiries cast serious doubt on the basis for these decisions. Richard Mulgan<sup>45</sup> says that as a result “a cynical public when offered a statement such as ‘my department assures me’ or ‘our intelligence sources tell us’ will simply treat it (as) yet more government spin”.

On a day-to-day level, government PR staff will pressure government departments for positive stories that promote their political masters’ “message” in the media. Australian Broadcasting Corporation state political reporter Steve Chase cites a leaked memo from a senior Carr Government adviser to government press secretaries in which the adviser laments: “We do not have enough strong stories to sustain us for the remainder of the (parliamentary) sessions”.<sup>46</sup> Political offices are also in the habit of workshopping loaded phrases, to be delivered in parliament or at doorstep interviews, designed to capture the attention of reporters and be repeated in their news bulletins and print stories.<sup>47</sup>

British academic and freelance journalist Ivor Gaber outlines the pre-eminence of “below-the-line” spin within the political process; that is, employing covert activities which are as much about strategy and tactics as about the imparting of information.<sup>48</sup> Those activities include consistency or “staying on message”; driving the news agenda in a particular direction by feeding “exclusives” to selected journalists; and burying bad news, an unpopular policy announcement, when the attention of the press is focused on another larger story, like a natural disaster or major sports event.

Some argue the news media are too dependent on material from PR professionals—many of whom are former journalists—who know how best to cater to the demands and deadlines of news rooms. The Press Council says it is troubled by a large number of cases where journalists rely on “unverifiable” information from government sources. “Much of the speculation throughout 2007 about the Liberal Party leadership has come from unnamed sources who have undoubtedly placed their own spin on the information,” it notes.<sup>49</sup> Burton adds: “The less reliance journalists have on government and corporate orchestrated exclusives, leaks and handouts, the better the prospects are that journalism will fulfil its public function of being an independent check on those who wield power in our society and as a vehicle to provide information, not advertising, to citizens.”<sup>50</sup>

Journalists contributing submissions to this audit say that government PR staff all too often try to block or frustrate, rather than facilitate, journalistic inquiries. Directing all inquiries through ministers’ offices, restricting the number of government employees

with authority to speak to the media, demanding that all questions be submitted in writing, taking a long time to issue responses to questions, offering answers of little value, and completely ignoring some questions, are the common features in a long list of grievances submitted to this audit.

<sup>1</sup> Commonwealth Ombudsman Annual Report 1994–1995, Canberra, p33

<sup>2</sup> For example, In *Commonwealth v Fairfax*, in dealing with an application by the Commonwealth to restrain Fairfax from publishing certain material, Mason J (as he then was) said:

*... it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action.*

<sup>3</sup> Australian Press Council *State of the News Print Media in Australia*, Sydney, October 2006

<sup>4</sup> *Ibid*, p 66

<sup>5</sup> David Banisar *Government Secrecy – Decisions without Democracy* (People for the American Way Foundation, July 2007)

<sup>6</sup> David Marr *His Master's Voice: The Corruption of Public Debate under Howard*, 26 *Quarterly Essay* 2007

<sup>7</sup> Clive Hamilton & Sarah Madison (eds) *Silencing Dissent*, 2007, Allen & Unwin

<sup>8</sup> Frank Moorhouse *The Writer in a time of Terror* in *The Trouble with Paradise*, (2007) 14 Griffith Review

<sup>9</sup> See 27 *Quarterly Essay* (2007)

<sup>10</sup> Bob Burton *Inside Spin: the Dark Underbelly of the PR Industry*, 2007, Allen & Unwin

<sup>11</sup> Protective Security Manual (PSM 2005)

[http://www.ag.gov.au/www/agd/agd.nsf/Page/Nationalsecurity\\_ProtectiveSecurityManual\(PSM2005\)](http://www.ag.gov.au/www/agd/agd.nsf/Page/Nationalsecurity_ProtectiveSecurityManual(PSM2005))

<sup>12</sup> Australian National Audit Office 'Operation of the classification system for protecting sensitive information, Audit Report 7 (1999-2000) at para 1.33

<sup>13</sup> Department of Premier and Cabinet, *Release of NSW Government Security Sensitive Information to Third Parties*, Memorandum 2007/13, 30 July 2007

<sup>14</sup> 'Brumby's door yet to open', *The Age*, 29 October 2007

<sup>15</sup> UN World Public Sector Report "E-Government at the crossroads 2003"

<sup>16</sup> Report on WA Government websites, 2005

<http://www.egov.wa.gov.au/index.cfm?event=projectsElectronic#webreview>

<sup>17</sup> [www.nationalsecurity.gov.au](http://www.nationalsecurity.gov.au)

<sup>18</sup> Usability one "Website Customer experience" Australia Federal Government websites February 2007

<sup>19</sup> "Digital Amnesia: Challenges of government online" 21 April 2005

<http://conferences.alia.org.au/seminars/digital.amnesia2005/summary.html>

<sup>20</sup> A useful discussion of the topic can be found in a paper for the Democratic Audit of Australia, Peter Chen, Rachel Gibson and Karen Geiselhart, 'Electronic Democracy? The Impact of New Communications Technologies on Australian Democracy', *Democratic Audit of Australia*, Report No.6. They explore the impact on democratic processes and use of electronic media by political parties and representative, the public service and the civil society during elections. While we note the dramatic effect technological communications have had on society and acknowledge that information is widely generated, held and disseminated through electronic processes, we do not propose to discuss the topic further in this report. Its effect on democracy and the public's right to know may well be a suitable subject for further research and/or comment.

<sup>21</sup> Based on research for the Audit by Freehills, September 2007

<sup>22</sup> Dr Kate Burton *Scrutiny or Secrecy, Committee Oversight of foreign and national security policy in the Australian Parliament*, Parliamentary Library, 2005

<sup>23</sup> *Sankey v Whitlam* (1978) 142 CLR 1 per Gibbs ACJ at 38

<sup>24</sup> Note the following comments from Spigelman CJ in *R v Young* (1999) 46 NSWLR 681 at 693:

*Public interest immunity is a field which has been plagued with terminological confusion. The use of "Crown privilege" has been abandoned. The confusion has not diminished. The words "public interest immunity" are sometimes treated as if they extended to any circumstance in which exclusion should be supported on the grounds of public policy — and in that sense involve a "public interest". They were so treated in the submissions in this case. The terminology of "public interest" should not be permitted to extend the basis of the doctrine.*

<sup>25</sup> Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*: ALRC Report 98 (2004) at [8.192]

<sup>26</sup> See, for example, *R v Lodhi* [2006] NSWSC 596. In a different context, see Wood CJ's comments in *R v Mallah* [2005] NSWSC 358 at 138

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- <sup>27</sup> Harry Evans, "The Senate" in Clive Hamilton & Sarah Madison, *supra* p10
- <sup>28</sup> Harry Evans, *Refusals by the Government to Provide Information to the Senate*, 18 July 2007
- <sup>29</sup> Lynne Lovelock, Clerk of the Legislative Council (NSW) *Orders for the Production of documents*, October 2007 (submission produced for the Audit)
- <sup>30</sup> *Egan v Willis & Cahill* (1996) 40 NSWLR 650; *Egan v Willis* (1998) 195 CLR 424; *Egan v Chadwick & Ors* (1999) 46 NSWLR 563
- <sup>31</sup> Legislative Council Hansard, 10 October 2007, pp 2983-3004; John Pesutto 'Openness means little in Opposition', *The Australian*, 30 October 2007
- <sup>32</sup> Dr Kate Burton, *supra*, p 30
- <sup>33</sup> Burton, *op cit*, p30
- <sup>34</sup> Please see the following examples from journalists and, for example, Warren Beeby, *Commonwealth Press Union Chairman's Report 2006*, 13 March 2007; JB Fairfax AM, paper to Marcus Oldham College, 5 October 2007; Norman Abjorensen *Not good news: Australia's shrinking Media Freedoms*, Democratic Audit of Australia, Discussion Paper 18/07 (September 2007)
- <sup>35</sup> Helen Ester *The Media* in Hamilton & Madison, *supra*, pp 101-123; recent research by the author for a thesis in material made available to the audit
- <sup>36</sup> *Ibid*
- <sup>37</sup> Helen Ester, draft chapter *Views from the gallery: Part one – the Interface*, forthcoming thesis.
- <sup>38</sup> Australian Press Council, *State of the Print Media Report 2007* <[www.presscouncil.org.au](http://www.presscouncil.org.au)> (Yet to be publicly released at time of print).
- <sup>39</sup> Bob Burton, "Have I got a story for you," *The Australian Financial Review* 24 August 2007, *Review* 3.
- <sup>40</sup> Bob Burton, *Inside Spin: The dark underbelly of the PR industry* (2007), 18.
- <sup>41</sup> Bob Burton, "Need to curb a PR industry spinning out of control," *The Sydney Morning Herald* 7 August 2007, 13.
- <sup>42</sup> Burton, *Inside Spin* (2007), x.
- <sup>43</sup> Australian Press Council, *State of the Print Media Report 2007* <[www.presscouncil.org.au](http://www.presscouncil.org.au)> (Yet to be publicly released at time of print).
- <sup>44</sup> Prof James Cotton "Australian Foreign Policy and the Management of Intelligence post-September 11", *Asia Pacific School of Economics and Government*, discussion paper series, 06-03
- <sup>45</sup> Dr Richard Mulgan "Truth in Government and the Politicisation of Public Service Advice", *Asia Pacific School of Economics and Government*, discussion paper series, 06-02
- <sup>46</sup> Steve Chase, *You Didn't Get It From Me: A reporter's account of political life in New South Wales from 1988-2001* (2006), 65.
- <sup>47</sup> *Ibid*, 63.
- <sup>48</sup> As quoted in Rick Snell, "FOI and the Delivery of Diminishing Returns, or How Spin-Doctors and Journalists have Mistreated a Volatile Reform" (2002) 2(3) *The Drawing Board: An Australian Review of Public Affairs* 187, 194-195.
- <sup>49</sup> Australian Press Council, *State of the Print Media Report 2007* <[www.presscouncil.org.au](http://www.presscouncil.org.au)> (Yet to be publicly released at time of print).
- <sup>50</sup> Burton, *Inside Spin* (2007), 237.

# **CHAPTER 4**

## **ACCESS TO INFORMATION**

### **ANNEXURE A**

#### **DOCUMENTS REFUSED TO THE SENATE**

**FROM 1 JULY 2005 TO 18 JULY 2007**

COMMUNICATIONS—TELSTRA—Documents held by Telstra Corporation relating to shareholder attitude surveys conducted by Crosby/Textor.

DEFENCE—IRAQ—DEPLETED URANIUM—Report of the Australian Defence Force on the presence of depleted uranium in the Australian area of operations in Al Muthanna province in southern Iraq.

EDUCATION—VOLUNTARY STUDENT UNIONISM—Documents relating to options for voluntary student unionism.

EMPLOYMENT—COMMUNITY PARTNERS PROGRAM—The review of the Community Partners program, as commissioned by the Office of the Employment Advocate and conducted by Deloitte Touche Tohmatsu.

ENVIRONMENT—HOPE DOWNS IRON ORE PROJECT—Briefing packages produced by the former Department of the Environment and Heritage for the Minister's consideration of the Hope Downs Iron Ore Project proposed by Hope Downs Management Services Pty Ltd.

ENVIRONMENT—NORTHERN TERRITORY—URANIUM MINES—Documents relating to the Commonwealth Government's authority to unilaterally approve uranium mines in the Northern Territory.

ENVIRONMENT—REVIEW OF MATTERS OF NATIONAL ENVIRONMENTAL SIGNIFICANCE—Report on the review of matters national environmental significance made under section 28A of the *Environment Protection and Biodiversity Conservation Act 1999*.

ENVIRONMENT—TASMANIA—STYX AND FLORENTINE VALLEYS—Documents relating to the implementation of the 2004 election commitment to protect 18 700 hectares of old-growth forest in the Styx and Florentine valleys.

FAMILY AND COMMUNITY SERVICES—NATIONAL DISABILITIES ADVOCACY PROGRAM REVIEW—The National Disabilities Advocacy Program Review 2006, carried out by Social Options Australia.

FAMILY AND COMMUNITY SERVICES—SMARTCARD PROPOSAL—Documents relating to the smartcard proposal.

FINANCE—BOARD OF THE RESERVE BANK OF AUSTRALIA—APPOINTMENT—Documents relating to the nomination and appointment of Mr Robert Gerard to the Board of the Reserve Bank of Australia.

FOREIGN AFFAIRS—UNITED STATES OF AMERICA—MILITARY COMMISSIONS ACT—Legal advice received by the Government relating to the legality of the United States of America's Military Commissions Act (2006).

HEALTH—BETTER OUTCOMES IN MENTAL HEALTH INITIATIVE—Report from the review of the Better Outcomes in Mental Health Initiative.

HEALTH—REGULATION OF NON-PRESCRIPTION MEDICINAL PRODUCTS—Report provided by Deloitte Touche Tohmatsu relating to the regulation of non-prescription medicinal products.

IMMIGRATION—457 VISA PROGRAM—Report prepared by the Department of Immigration and Multicultural Affairs relating to T&R Pastoral and its employment of workers on subclass 457 visas.

IMMIGRATION—SIEV X—Documents detailing passengers purported to have boarded the vessel known as SIEV X.

LAW AND JUSTICE—AUSTRALIAN WHEAT BOARD—The Organisation for Economic Co-operation and Development foreign bribery survey response by AWB Limited.

LAW AND JUSTICE—BORDER RATIONALISATION TASKFORCE—Report of the Border Rationalisation Taskforce prepared in 1998.

SCIENCE AND TECHNOLOGY—COMMONWEALTH SCIENTIFIC AND INDUSTRIAL RESEARCH ORGANISATION—Documents relating to the research and development work to be undertaken by the CSIRO.

SCIENCE AND TECHNOLOGY—COMMONWEALTH SCIENTIFIC AND INDUSTRIAL RESEARCH ORGANISATION—SHEEP STUDY—Documents relating to a sheep study conducted by the CSIRO on the effect of transgenic peas on the immune response of sheep.

TAXATION—INFRASTRUCTURE BORROWINGS TAX OFFSET SCHEME—Documents held by the Department of Transport and Regional Services relating to taxation deductions under the Infrastructure Borrowings Tax Offset Scheme.

TRANSPORT—CIVIL AVIATION SAFETY AUTHORITY—TRANSAIR—Documents relating to Lessbrook Pty Ltd trading as Transair.

ENVIRONMENT—REVIEW OF MATTERS OF NATIONAL ENVIRONMENTAL SIGNIFICANCE—Report on the review of matters of national environmental significance made under section 28A of the Environment Protection and Biodiversity Conservation Act 1999.

ENVIRONMENT—TASMANIA—STYX AND FLORENTINE VALLEYS—Documents relating to the implementation of the 2004 election commitment to protect 18 700 hectares of old-growth forest in the Styx and Florentine valleys.

FOREIGN AFFAIRS—UNITED STATES OF AMERICA—MILITARY COMMISSIONS ACT—Legal advice received by the Government relating to the legality of the United States of America's Military Commissions Act of 2006.



ENVIRONMENT—HOPE DOWNS IRON ORE PROJECT—Briefing packages produced by the former Department of the Environment and Heritage for the Minister's consideration of the Hope Downs Iron Ore Project proposed by Hope Downs Management Services Pty Ltd.

DEFENCE—NAVAL SHIPS—SAFETY—Documents including briefs to ministers concerning complaints and allegations relating to substandard maintenance on Navy ships, particularly with respect to HMAS Westralia.

ENVIRONMENT—PROPOSED ANVIL HILL COAL MINE—Documents relating to the Anvil Hill coal mine.

*COURTESY HARRY EVANS, CLERK OF THE SENATE*

# **CHAPTER 4**

## **ACCESS TO INFORMATION**

### **ANNEXURE B**

#### **NOTABLE REFUSALS TO PROVIDE INFORMATION TO SENATE COMMITTEES**

**FROM 1 JULY 2005**

These examples are drawn mostly from estimates committee hearings between November 2005 and February 2007.

- Any information which could be said to be in the nature of advice to government is routinely refused; the reason usually given has been that advice to government is not disclosed, but there are many examples of advice being voluntarily disclosed where the government chooses to do so. For example, the government declined to produce material, said to be advice, on the sale of Medibank Private, but volunteered a legal opinion on the legality of the sale when that was questioned by a Parliamentary Library paper.
- A range of questions about government advertising have been refused answers because they related to pending campaigns.
- A committee was refused information in relation to the works on the Gallipoli site on the basis that the information constituted advice to government.
- Having indicated that government legislation would be accompanied by family impact statements, the government declined to produce any of those statements on the basis that they were confidential to Cabinet.
- There was a two-year delay in responding to a question about the cost of functions at Kirribilli House and the Lodge, and then there was a refusal to answer the question. This refusal to give costs of particular functions has since been repeated.
- The government issued an instruction that officers would not be permitted to answer any questions about the AWB Iraq wheat bribery affair because a commission of inquiry into the matter had been appointed; this created a precedent of refusing any information where a government-appointed inquiry is on foot, and this ground was used in subsequent cases, for example, in the Kovco and Fahy cases. The refusal to answer some questions was repeated even after the commission of inquiry had reported.
- The government declined to disclose the amounts of money paid by government to JobNetwork providers.

- There was a refusal to answer questions about the conditions of confinement of David Hicks, on the ground of his privacy.
- There was a refusal to produce legal advice on the legality of the US Military Commissions.
- The agreement between Australia and the US for the transfer of prisoners from Guantanamo Bay was not disclosed on the basis that it is confidential.
- The Office of the Employment Advocate declined to produce any further statistics about AWAs, on the ground that the statistics were no longer being collected.
- Forward estimates of expenditure were refused because they are not published; the economics departments have declined to produce other economic data on the basis that it is not published.
- Where questions have been taken on notice, and the answers have been supplied to a minister's office, there has been a refusal to respond to the same or similar questions in oral hearings on the ground that, until the minister chooses to release answers to the previous questions, such questions will not be answered. This position has been carried over from one estimates hearing to another, so that questions taken on notice in one hearing are out of bounds in a subsequent hearing.
- In several instances material has been disclosed by departments, apparently accidentally, which demonstrates that answers to questions on notice provided by departments are altered in ministers' offices to make the answers less informative and to withhold some information.
- Departments and/or ministers (it is not always clear who is responsible) frequently "dump" answers to questions on notice, or responses which consist of refusals to answer, on committees just before the next round of estimates hearings, so that committee members do not have adequate time to consider the answers or refusals.
- Several departments now attach estimates of the cost of answering questions to all their answers, and there have been refusals to answer particular questions on the basis that preparing answers would be too costly. A senator asked the Department of Employment and Workplace Relations how many people were receiving a particular entitlement. The department eventually answered that 2857 people were receiving the entitlement and the preparation of the answer took 26.7 hours at a cost of \$438.51.

*Courtesy of Harry Evans, Clerk of the Senate*

## CHAPTER 4

### ACCESS TO INFORMATION

#### ANNEXURE C

##### Orders for documents since 1999

Below is a list of orders for papers on which the Government has claimed privilege, and orders on which the claim of privilege was disputed, since 1999.

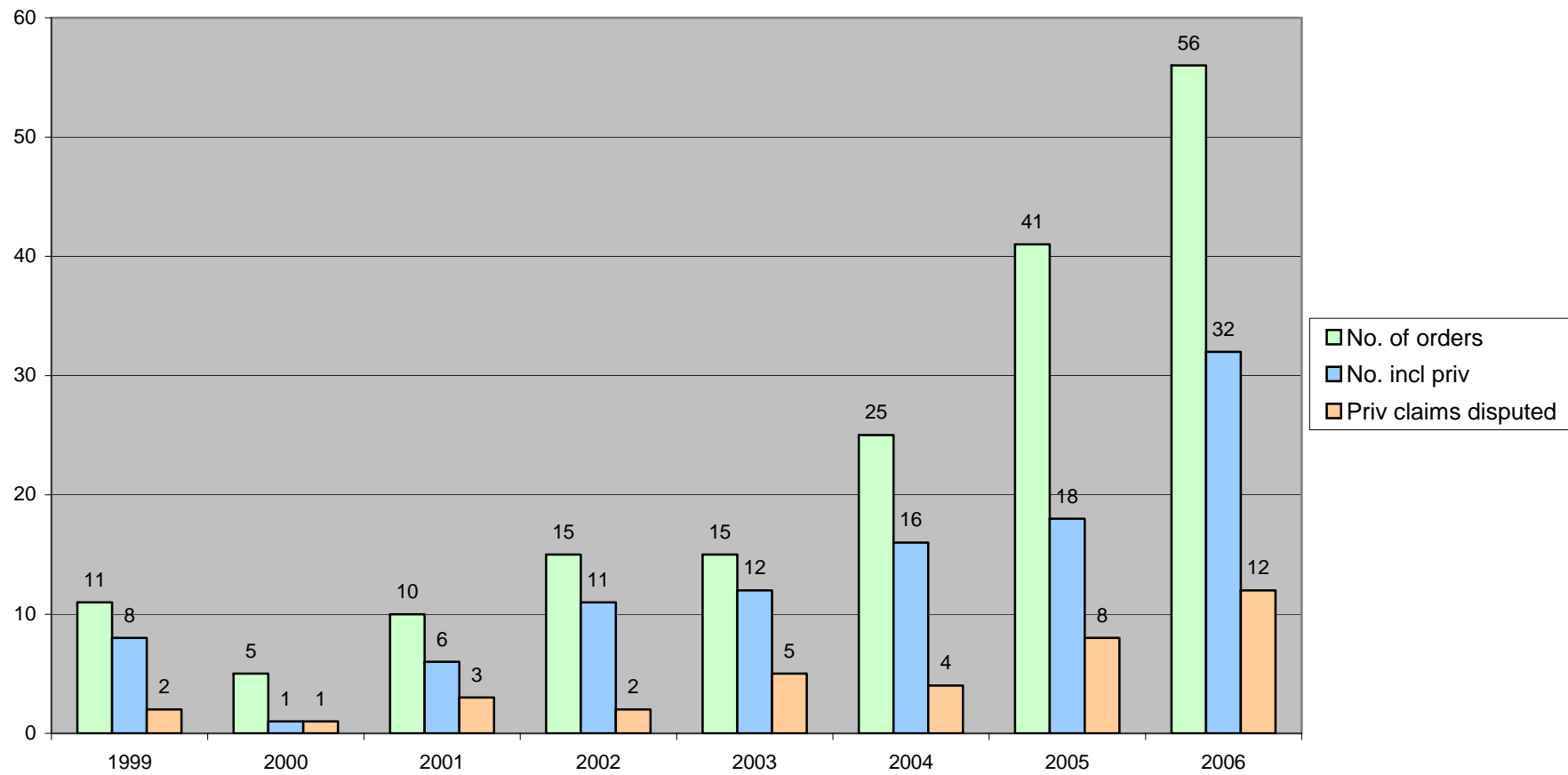
Date of order	Title of order	Arbiter's report tabled
01/07/1999	Northside Storage Tunnel	
15/09/1999	Delta Electricity	20/10/1999
23/09/1999	Integral Energy	
21/10/1999	M2 Motorway Project	
10/11/1999	M2 Motorway Project	07/12/1999
24/11/1999	Redevelopment of Walsh Bay	
25/11/1999	M5 Motorway Project	
30/11/1999	Coorabin Landfill	
16/11/2000	FreightCorp	
07/03/2001	Ethnic Affairs Commission Program Review	
28/03/2001	M5 East Ventilation Stack	06/06/2001
30/05/2001	North Head Quarantine Station	18/09/2001
06/06/2001	Land Clearing by Transgrid	
18/09/2001	Wellington Local Aboriginal Land Council	24/10/2001
08/05/2002	Mogo Charcoal Plant	05/06/2002
26/06/2002	M5 East Motorway	
05/09/2002	M5 East Motorway	30/10/2002
19/09/2002	Development of Crown Land (Woodward Park)	08/05/2003
24/10/2002	Batemans Bay Sporting Shooters Association	
30/10/2002	Inspector-General of Corrective Services	
20/11/2002	NSW Government IT Tender	
21/11/2002	Proposed Botany Bay Expansion	
04/12/2002	Development Application at Fox Studios	
7/05/2003	Millennium Trains	3/9/2003, 24/2/2004
29/05/2003	Dr Shailendra Sinha	
24/06/2003	Cross City Tunnel	17/9/2003, 20/10/2005
25/06/2003	Millennium Trains—Further Order	
3/07/2003	Junee Correctional Centre	
3/07/2003	Education	
17/09/2003	Callan Park	
17/09/2003	M5 East Tunnel Ventilation	
17/09/2003	Tamworth West Public School	
18/09/2003	Redbank 2 Power Station	
20/11/2003	Oil Seeds	
4/12/2003	Camden and Campbelltown Hospitals	

25/02/2004	Sydney Water	
10/03/2004	Camden and Liverpool Hospitals	
18/03/2004	Austeel Project in Newcastle	
31/03/2004	Axiom Education Consortium	1/9/2004
11/05/2004	Mini-Budget	
12/05/2004	Acmena Juvenile Justice Centre, Grafton	
1/06/2004	Tunnel Ventilation Systems	14/9/2004, 28/2/2006
1/09/2004	Luna Park Site	
1/09/2004	Sydney's Water Supply	
16/09/2004	Proposed Primary School at Lake Cathie	
21/09/2004	Beacon Hill High School	
21/10/2004	Orange Grove Designer Outlets Centre, Liverpool	
28/10/2004	Dalton Reports into Juvenile Justice	
8/12/2004	Road Transport (General) Amendment (Driver Licence Appeals) Regulation 2004	
8/12/2004	Redfern-Waterloo Authority	
8/12/2004	Development of Lands at Callan Park	
24/02/2005	Road Tunnel Filtration	28/2/2006
24/02/2005	Grey Nurse Shark	Report not tbl'd
24/02/2005	Audit of restricted rail lines	22/6/2005
2/03/2005	Coastal Shack Licences in the Royal National Park	
3/03/2005	Wood Product Extraction Operations	
23/03/2005	Audit of Restricted Rail Lines— Further Order	
23/03/2005	Development of Lands at Callan Park—Further Order	
4/05/2005	Ambulance Services	
7/06/2005	Tunnel Air Quality	28/2/2006
22/06/2005	Circular Quay Pylons	15/9/2005
22/06/2005	Lane Cove Tunnel	28/2/2006
23/06/2005	Proposed Sale of Vacluse High School	
15/09/2005	M4-M5 Cash Back Scheme	
12/10/2005	Purchase of Yanga Station	
18/10/2005	Cross City Tunnel—Further order	16/11/2005
9/11/2005	Swansea Bridges	
9/11/2005	Desalination plant	22/12/2005
16/11/2005	Purchase of Yanga Station—Further order	
16/11/2005	Luna Park Leases and Agreements	19/6/2006
17/11/2005	Marina Development at Careel Bay	
30/11/2005	Proposals for Construction of roads	
1/12/2005	Grey Nurse shark—Further order	
1/03/2006	Audit of expenditure and assets	26/6/2006
8/03/2006	Firearms Safety Training	
8/03/2006	Lane Cove Tunnel—Further order	
9/05/2005	Firearms Safety Training—Further order	
3/05/2006	Lane Cove Tunnel—Further order	25/5/2006
3/05/2006	Broadacre project	
3/05/2006	Dioxin levels in Sydney Harbour	21/6/2006
3/05/2006	Sale of PowerCoal assets	28/6/2006
4/05/2006	Tariro Unit, Metro West Residences, Westmead	
4/05/2006	"Yasmar", Haberfield	
25/05/2006	Snowy Hydro Limited—Further orders	16/8/2006

6/06/2006	Tunnel filtration—Further order	21/11/2006
7/06/2006	Canterbury Multicultural Aged and Disability Support Services Inc.	6/12/2006
8/06/2006	Darkinjung Local Aboriginal Land Council—Further order	
5/09/2006	Taronga Zoo Asian Elephants	6/12/2006
20/09/2006	Lane Cove Tunnel—Further Order	
28/09/2006	Bankstown Handicapped Children's Centre	
18/10/2006	Gladesville Hospital site	
18/10/2006	Hunter Rail cars	Motion to table on Notice Paper
18/10/2006	Boral Timber	Motion to table on Notice Paper
18/10/2006	M5 East tunnel filtration	2/1/2007
19/10/2006	State finances	18/1/2007
19/10/2006	Police Report into Cronulla riots	
25/10/2006	Maldon-Dumbarton rail line	12/12/2006
14/11/2006	Gretley mine disaster	28/6/2007
21/11/2006	Callan Park—Further order	
22/11/2006	Carlton United Breweries site	
22/11/2006	Desalination Plant—Further order	
23/11/2006	Warragamba Dam	
23/11/2006	Hunter and Central Coast water supply	
23/11/2006	Lower Hunter Regional Strategy	
23/11/2006	Operation Retz	
06/06/2007	Iron Cove Bridge	
20/06/2007	2007-2008 Budget	Report rcvd out of session – notice of motion yet to be given
28/06/2007	Coffs Harbour Port	

Below is also a graph listing the number of orders for papers, the number of returns including privileged documents, and the number of returns upon which the claim of privilege was disputed since in 1999.

**No. of privileged claims disputed since Egan v Willis, 99-06**



Compiled: Clerk of the Legislative Council (NSW)

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## **CHAPTER 5**

### **PROTECTING WHISTLEBLOWERS AND JOURNALISTS' SOURCES**

#### **EXECUTIVE SUMMARY**

No current legislation defines the terms “whistleblower” or “whistleblowing”, but eight Acts and three Bills across Australia deal with the subject.

Whistleblowing law in Australia varies widely between the nine jurisdictions - federal, six states and two territories. The types of disclosers and the nature of disclosures vary; the level and forms of protection vary; and the type and severity of penalties for reprisals, including breaches of employer obligations, vary.

There is significant inconsistency in whether a law applies to the public and/or private sector.

The limited scope of the whistleblower legislation has been criticised. Comprehensive application to all sectors needs debate. A clear public sector focus may be appropriate.

There is significant inconsistency in the types of wrongdoing about which disclosures can be made that trigger the relevant legislation. In some circumstances the conduct about which a disclosure is made is too general and outside the realm of whistleblowing. In other cases such conduct is too narrowly defined, for example, only unlawful behaviour. Only three laws (South Australia, Queensland and Western Australia) take a comprehensive approach to identifying the public sector wrongdoing that qualifies disclosures.

There are significant gaps in the nature and extent of protection provided. Whistleblowers need to be relieved of potential liability for their disclosure, such as the risk of disciplinary or criminal prosecution for unauthorised disclosure of information or civil action such as defamation. Damages are only available through employment, anti-discrimination or EEO tribunals. Only three jurisdictions provide injunction or compensation remedies for potentially or actually aggrieved whistleblowers.

The Federal Parliament has traditionally lacked a general power to implement comprehensive whistleblower legislation. It has used the corporations power to provide for protection in specific private sector areas. However, it does not lack power to legislate to protect its own employees and contractors.

It might be appropriate to have a single national legislative regime dealing with all aspects of whistleblowing (public and private). The two states (Queensland and South Australia) which have tried have produced unsatisfactory results.

A key issue arises from the distinction between leaks in general and the sub-class of leaks that are public interest disclosures (PIDs). In short, it is logical that if there is a

public interest in such disclosures then their messengers should be encouraged and protected rather than shot at.

A strong case can be made for uniform public interest disclosure legislation. A new-model federal law should at least protect whistleblowers who disclose to the media after making a reasonable attempt to have the matter dealt with internally, or where such a course was impractical.

Journalists in Australia are inadequately served by shield legislation and the common law in relation to their ability to protect the identity of their sources.

Particularly in relation to the new shield provision in the Commonwealth *Evidence Act*, since any unauthorised communication of information remains criminalised even where it is a PID, this exception seems bound to apply in nearly all cases of leaks of information to journalists. Hence the privilege apparently offered is a sham.

Improving Australian shield laws will be to little effect in relation to government information if the sources whose identity those laws are designed to protect face exposure through a conjunction of political forces. That conjunction, at least at Commonwealth level, involves a dogged refusal to provide substantial legislative protection to whistleblowers together with a relentless determination to track down the source of disclosures which the aforementioned refusal ensures remain “unauthorised”. That determination was perhaps best expressed by the Secretary of the Prime Minister’s Department, Peter Shergold, who was quoted as saying “if some people seem surprised that I have called in the police to deal with leaks, they shouldn’t be—I always have and I always will”.

There are in essence two approaches to shield legislation and the guidance it provides the judiciary. The first rests on the presumption that disclosure of journalists’ sources is necessary unless there is some case made out to resist disclosure. In short, the onus is on the journalist. The alternative is that disclosure of sources is not necessary and a case must be made out on the basis of some compelling public interest as to why the presumption against disclosure should be overturned.

Clearly Australia has a long way to go before its legislation embodies the desirable second alternative.

There is a good case for an effective shield law regime based on a presumption that sources should not be revealed and journalists could be ordered to do so by a judge only on strictly limited grounds of compelling public interest.

## CHAPTER 5

### PROTECTING WHISTLEBLOWERS AND JOURNALISTS' SOURCES

#### 5.1 Introduction

The convictions of an alleged whistleblower and two journalists this year dramatically highlighted some issues discussed here. Publication in *The Australian* of Customs officer Allan Kessing's reports on lax airport security—after they had been ignored by his superiors for two years—led to a \$200 million improvement program. Kessing was convicted of disclosing official information without authority. *Herald Sun* journalists Michael Harvey and Gerard McManus published a story revealing the Federal Government was burying recommendations for reform that would cost war veterans \$500 million. Harvey and McManus were convicted of contempt for refusing to name their source.

These two cases are set out in more detail later in this chapter. Worth noting here is that both cases revealed matters of substantial public interest, notwithstanding that each was embarrassing to the government. Also, protecting national security is a frequent claim made to justify secrecy, yet the Kessing case produced an upgrade to airport security that was not in prospect until prompted by *The Australian's* report.

Whistleblowers—people who make public interest disclosures—perform a unique function in bringing to light information that their colleagues or masters would wish to remain hidden. When a whistleblower discloses previously secret information to the news media, legal and other consequences may follow for both the whistleblower and the journalist to whom the disclosure was made. Where the whistleblower seeks confidentiality of their identity consistent with the journalist's code of ethics, in some jurisdictions the journalist may be able to invoke “shield” laws that excuse them in legal proceedings from identifying their informant for a report.

The operation (or absence) of measures to protect whistleblowers and shield laws for journalists has a significant effect on the capacity of the news media to report and thus the public to be properly informed about undesirable activity in both the public and private sectors. Particularly in relation to government whistleblowers and journalists' capacity to protect their identity, the absence of both shield laws and effective legislation to protect whistleblowers is “an impediment to the community being informed as to whether ‘the democratic machinery is in good working order’.”<sup>1</sup>

This chapter looks at the position in Australia in relation to these issues and considers overseas comparisons.

## 5.2. Public interest disclosure (PID) legislation overview

The context for this overview is set by two observations about whistleblowers and PIDs generally. The first is that whistleblowers should be encouraged and protected because, by their very position as insiders, they are best placed to identify improper activity that it is in the public interest to eliminate from their organisation. In this report we use the term “whistleblower” to refer to a person who makes a PID.<sup>2</sup> The second is that the possibility of public exposure, usually via the media, of activities that could prompt a PID provides significant discouragement to such activity. Also, where such activity occurs, media exposure of it is often the most powerful prompt for effective remediation and the prevention of recurrence.

This overview is to a considerable extent based on the comprehensive data contained in Dr A.J. Brown’s survey and rating of legislation in his November 2006 issues paper “Public Interest Disclosure Legislation in Australia: Towards the Next Generation” (for the largely Australian Research Council-funded *Whistling While They Work* project) and on substantial research conducted for this audit by Blake Dawson Waldron, solicitors.

Before moving to the overview we should clarify the distinction between PIDs and “leaks”. In terms of this audit the relevant Macquarie Dictionary definition of the verb “leak” is “*to disclose (information, especially of a confidential nature), especially to the media*”. Although often intentional, leaks can at times be accidental or inadvertent. Documents are left forgotten in airport lounges and can even “fall off the back of a truck”. The essential character of a leak is the transmission of information to one or more people outside of the group to whom that information would normally be available and confined.

This definition provides the key to dispelling a number of common misconceptions. The first is that the terms “PID” and “leak” are interchangeable. The following explains why they are not:

- An internal PID made to an authorised person within an organisation is clearly not a leak—it would become so if it was repeated in an unauthorised fashion to the media.
- Some leaks—for instance, those involving a breach of privacy—may not be designed to advance, nor do they actually advance, any public interest (as distinct from pandering to prurience or mere curiosity). Such leaks are not PIDs.

The second point above raises the issue of motivation. In this respect an associated misconception is that if actuated by malice a disclosure cannot be a PID. This misconception is often embraced by those who are the subject of a disclosure. In fact the substance of the disclosure alone determines whether there is sufficient public interest in pursuing the issue raised. Motivation may only be relevant to the care needed in investigating or otherwise handling the PID.

Current and proposed PID legislation in Australia comprises eight Acts and three Bills. In date order they are:

*Whistleblowers Protection Act* 1993 (South Australia)  
*Whistleblowers Protection Act* 1994 (Queensland)  
*Protected Disclosures Act* 1994 (New South Wales)  
*Public Interest Disclosure Act* 1994 (Australian Capital Territory)  
*Public Service Act* 1999 (Commonwealth): section 16 “Protection for whistleblowers”  
*Public Interest Disclosure Bill* 2001 [2002] (Commonwealth- a private member’s Bill)  
*Whistleblowers Protection Act* 2001 (Victoria)  
*Public Interest Disclosures Act* 2002 (Tasmania)  
*Public Interest Disclosure Act* 2003 (Western Australia)  
*Public Interest Disclosure Bill* 2005 (Northern Territory - a government Bill)  
*Public Interest Disclosure Bill* 2006 (Australian Capital Territory - a government Bill)

The following points arise largely from the analyses of Dr Brown and Blake Dawson Waldron:

- PID legislation (also known as whistleblower protection laws), varies significantly across Australian jurisdictions. Commonwealth law is the most glaringly inadequate. Even the best existing laws (as well as the Bills) fall well below best practice in major areas.
- Dr Brown sees the need for a “second generation” of legislation, not just an amendment of existing laws. Ideally this would be delivered via uniform legislation modelled on a new Act rectifying the Commonwealth’s longstanding deficiencies in this area. From discussion in the academic literature, this Act would embody best practice settlement of (among others) the issues set out below.

### **5.3. Lack of extension of protection to disclosures to the media**

- (A) Only NSW extends protection to disclosures made outside official channels (to the media or other third parties). This is despite whistleblowing to the media being the archetypal and best known example of the practice.<sup>3</sup> It is often only exposure by the media or risk of such that leads authorities to appreciate the seriousness of some matters and to act.<sup>4</sup> Curiously, protection is framed apparently with public whistleblowing in mind, for example, by removing the risk of action for breach of confidence or defamation.<sup>5</sup> This reluctance to include the media is understood to arise from an official apprehension against public disclosures.
- (B) Queensland and the ACT specifically exclude disclosures to MPs and journalists. David Lewis, for example, does not believe that such an approach is justifiable, but provides little reasoning.<sup>6</sup>

### **5.4. Clarification and consistency in definition of whistleblower and whistleblowing**

No current legislation defines the terms “whistleblower” or “whistleblowing”<sup>7</sup> (see also footnote 2).

In practice, the term “whistleblower” is also subject to opposing stereotypes (e.g. hero/traitor) and perhaps alternative defined terms are required.<sup>8</sup>

Jurisdictions differ significantly in defining the populations from which whistleblowers may spring and the qualifications they may need to meet.<sup>9</sup>

There should be, but in many cases is not, an institutional or employment connection between the whistleblower and organisation concerned.<sup>10</sup> There are two main reasons such a connection is crucial:

- 1) it is because of their internal position that whistleblowers have valuable information to disclose; and
- 2) they are internal and require protection and encouragement to disclose.

Such a connection is only required under the *Corporations Act* 2001 (Cth) and in some respects, the *Whistleblower Protection Act* 1994 (Qld).

The ability for “any person” to be able to make a disclosure (for example, in Victoria, SA and the ACT):<sup>11</sup>

- dilutes the purposes and focus of the legislation;
- confuses its operation;
- narrows interpretations of the type of reportable matters; and
- becomes a tool for complaints that are not truly whistleblowing.

There is inconsistency and a lack of clarity, and in some circumstances breadth, regarding which “organisation members” are covered.<sup>12</sup> There is similar inconsistency and a lack of clarity as to how witnesses and family or associates of those who provide information should be protected.<sup>13</sup>

These issues could be redressed by:<sup>14</sup>

- amending the trigger and coverage to be those disclosures “internal” to the organisation concerned;
- providing that those “internal” to the organisation should include contractors, employees of contractors, some volunteers, and persons formerly in those categories;
- ensuring appropriate categories of “organisation members” are carefully defined and covered; and
- protecting other disclosures and complaints from reprisals or harassment under other legislation, e.g. criminal codes.

There is also variability in the extent to which legislative protection extends to third parties potentially at risk of reprisals as the result of whistleblowing, in addition to the actual whistleblower.<sup>15</sup>

#### **5.4.1. Clarification and consistency as to scope and focus of whistleblowing laws. Views on the optimal outcome are far from uniform**

There is significant inconsistency in whether a law applies to the public and/or private sector.<sup>16</sup> Parts of the South Australian and Queensland legislation apply to disclosures of certain types of wrongdoing in the private sector.

The limited scope of the whistleblower legislation has been criticised. Comprehensive application to all sectors needs debate.<sup>17</sup> A clear public sector focus may be appropriate.<sup>18</sup>

In many cases, the PID law does not create an entirely new investigative regime unique to whistleblowing. It is added to other issues of public integrity already dealt with by a range of agencies.<sup>19</sup>

#### **5.4.2. Clarification and consistency as to motive**

Most jurisdictions do not inquire about the whistleblower's motive. Rather, they must have reasonable grounds to believe the information is true. Knowing and reckless provision of false information is an offence. In the private sector, the *Corporations Act* 2001 (Cth) provides that a whistleblower must make a disclosure in good faith.<sup>20</sup>

This contrasts with NZ, the UK and South Africa. NZ stipulates that disclosers must not act in bad faith (otherwise the statutory protection is lost); UK and South Africa require disclosers to have a reasonable belief as to wrongdoing committed or to be committed (there is no offence of disclosing false information) and their provisions only apply to whistleblowers who act in good faith.

Requirements concerning motive will lead to problems with proof and could act to deter disclosing. It should suffice for laws to require whistleblowers to have reasonable grounds to believe their information is true or likely to be so.<sup>21</sup>

#### **5.4.3. Clarification and consistency as to types of wrongdoing covered**

There is significant inconsistency in the types of wrongdoing about which disclosures can be made that trigger the relevant legislation.<sup>22</sup>

In some circumstance the conduct about which a disclosure is made is too general and outside the realm of whistleblowing.<sup>23</sup> In other cases such conduct is too narrowly defined, for example, only unlawful behaviour.<sup>24</sup>

Only three laws (South Australia, Queensland and Western Australia) take a comprehensive approach to identifying the public sector wrongdoing that qualifies disclosures.<sup>25</sup>

There is significant inconsistency in relation to the standard of seriousness a matter must meet to be a subject for a PID and in some circumstances an inappropriately high threshold applies to all forms of subject conduct<sup>26</sup> (as noted in (b) above).

Definitions of wrongdoing in the private sector also attach to certain wrongdoing for certain purposes otherwise linked to other legislation<sup>27</sup> e.g. the *Workplace Relations Act*.

These issues above could be redressed by a comprehensive approach to reform.<sup>28</sup> Some suggest a broad definition of what qualifies disclosures for protection, used in the UK and South African legislation, should be adopted “with the proviso that specific mention should be made of reprisals and serious wrongdoing that does not amount to a breach of a legal obligation”.<sup>29</sup>

In NSW, a disclosure which “principally involves questioning the merits of government policy” or avoiding dismissal or disciplinary action will not be protected. This has been questioned.<sup>30</sup> In our view arguing the merits (but not the lawfulness) of government policy is a legitimate exclusion. However, if “avoiding dismissal or disciplinary action” is the equivalent of “turning crown evidence” in a criminal matter, that exclusion appears to be against the public interest.

#### **5.4.4. Lack of consistency in the evidence required to support a disclosure**

Differences in the evidence that whistleblowers must have to support their disclosures range from reasonable belief/grounds to believe information is accurate (Victoria, Tasmania) to the information be accurate if disclosed to a journalist or MP (NSW).<sup>31</sup>

#### **5.5. Lack of protection**

There are significant gaps in the nature and extent of protection provided.<sup>32</sup> Whistleblowers need to be relieved of potential liability for their disclosure, such as the risk of disciplinary or criminal prosecution for unauthorised disclosure of information or civil action such as defamation. Damages are only available through employment, anti-discrimination or EEO tribunals. Only three jurisdictions provide injunction or compensation remedies for potentially or actually aggrieved whistleblowers.<sup>33</sup>

There is no streamlined avenue for seeking compensation for damage arising from a breach (short of dismissal) of the employers’ obligation not to victimise.<sup>34</sup> There needs to be a greater financial deterrent. Prosecutions for reprisal offences are still very difficult.<sup>35</sup>

There are still high rates of retaliation for whistleblowing according to statistics.<sup>36</sup>

Some suggest financial inducements for whistleblowing. Others consider this would disrupt from the public good (by focusing on personal gain). There is also a lack of consistency in available penalties for retribution (for example, criminal sanctions) and a lack of theoretical approach to whether meaningful damage awards could deter reprisals.<sup>37</sup>

There remain differences as to the relevant external agency to which disclosures can be made.<sup>38</sup>



## **5.6. Legislative framework**

The Federal Parliament has traditionally lacked a general power to implement comprehensive whistleblower legislation. It has used the corporations power to provide for protection in specific private sector areas. However, it does not lack power to legislate to protect its own employees and contractors.

It might be appropriate to have a single national legislative regime dealing with all aspects of whistleblowing (public and private).<sup>39</sup> The two states (Queensland and South Australia) which have tried have produced unsatisfactory results.

The detailed regulatory-based approach has resulted in problems of fragmentation and inconsistency that are difficult to remedy.<sup>40</sup>

Comprehensive and fully uniform legislation would require co-operation between states (for uniformity) or a referral of power to the Commonwealth under paragraph 51 (xxxvii) of the Constitution. The latter is unlikely.<sup>41</sup>

There is a strong case for recalling the fundamental first principles of whistleblower protection and finding legislative strategies to make these work in simple ways irrespective of organisational context.

Public interest in the disclosure of crimes or corruption can outweigh official obligations of confidentiality.<sup>42</sup> PID legislation is a move to complement and codify principles discoverable in common law<sup>43</sup> although such codification alone will not produce effective whistleblower protection.

There is a need to consider if multiple disclosure avenues should be provided.<sup>44</sup>

In addition to the above legal requirements, related and practical protection (such as confidentiality requirements, witness management systems, policy and guideline development) also require greater statutory and financial support.<sup>45</sup>

Other matters of debate include if there should be a duty to investigate and provide feedback and the types of authorities to whom disclosure could or should be made.<sup>46</sup>

## **5.7. Limitations on the protection of people who leak information without authority to the media**

Legislators in Australia, the US and the UK are virtually unanimous “in their disregard for media whistleblowing. This is likely to be motivated by distrust of media whistleblowers’ motives”.<sup>47</sup> To the extent it is recognised, there are strict procedural prerequisites for recognising the disclosure.

We have found little literature about limitations on the protection of people who without authority leak information covered by whistleblowing legislation to the media. Some suggest media disclosures should be permitted, particularly where other outlets have produced no effective response. There is research (albeit somewhat dated) that suggests US media whistleblowers “do not have baser motives, are not more vengeful and do not have less reliable grounds for their claims than others”.<sup>48</sup>

The key issue arises from the distinction (noted at the beginning of this chapter) between leaks in general and the sub-class of leaks that are PIDs. In short, it is logical that if there is a public interest in such disclosures then their messengers should be encouraged and protected rather than shot at.

Only NSW extends protection, in limited circumstances, to officials who make PIDs to MPs or the media. Such reporting is only authorised if the government authority to which the matter was first disclosed did not, within six months of the disclosure, investigate the matter; complete an investigation; make recommendations after investigating; or report to the whistleblower its intention whether to investigate. Also, not only must the whistleblower reasonably believe the disclosure is substantially true, it must actually be substantially true. This onus on whistleblowers can only serve to deter them from going to the media or an MP.

None of the US statutes identify the media as a proper recipient of a whistleblower's report. Generally, by defining the "government entity" as the appropriate recipient, such reporting is expressly prevented. Only one US statute protects reporting to the media as a non-governmental external party.<sup>49</sup> The UK protects disclosures to the media only when strict prerequisites are satisfied.

Literature identifies only that further discussion is needed to clarify this protection and to legislate it generally.

Generally, however, it has been suggested that "reporting misconduct qualifies as blowing the whistle when the communication is made to a person or organisation empowered to take corrective action".<sup>50</sup> In this respect, it is the desire to "stop and rectify" which underlies statutory approaches. Indeed, most legislators "do not consider journalists as appropriate whistleblowing outlets, despite the power of the media to bring about change".<sup>51</sup>

As Brown notes, "A variation was recently recommended by Queensland's Bundaberg Hospital Commission of Inquiry. This was triggered when a senior nurse disclosed concerns to her local parliamentarian (a member of the Opposition) about the pace of the internal response to evidence of medical negligence. The commission endorsed the principle that 'a whistleblower ought to be able to escalate his or her complaint' in the event that no satisfactory action is taken, recommending that there should be mandatory notification of disclosures to a central agency (the Ombudsman), and that if an agency does not resolve a disclosure within 30 days, the whistleblower ought to be able to make the disclosure to a member of Parliament, and then, after a further 30 days, to the media".<sup>52</sup> However, an obvious problem with this recommendation is that it will rarely provide time for any serious investigation.

## **5.8. Codes of conduct**

Intersecting with legislation has been the proliferation and augmentation in recent times of organisational codes of conduct. These have had divergent implications for whistleblowers. Nearly all codes have a clause setting out an employee's duty to keep confidential any information obtained through their employment. Another near-universal clause requires an employee to treat all colleagues with respect.

Any breach of the code can give rise to disciplinary action. The latter clause could be seen as discouraging whistleblowers generally (since exposing a colleague's misconduct can be seen as an act of disrespect to the colleague) and the former clause can be seen as preventing an employee from making a PID to anyone outside their organisation.

On the other hand some codes impose an obligation for employees to report to management any misconduct—thus including reports of misconduct that would constitute a PID. Some PID legislation contains a specific provision that making a PID overrides any other obligation of confidentiality that might have applied to the disclosure. This statutory protection is a vital provision to encourage and support whistleblowers.

### **The Smith case<sup>53</sup>**

In September 2002 Trent Smith, a Department of Foreign Affairs and Trade (DFAT) officer, received an email from Mr Wells, a staff member of the Opposition spokesman on Foreign Affairs, seeking a list of those individuals consulted in the preparation of a White Paper. Mr Smith's reply referred Mr Wells to public sources or the possibility of seeking the information during Senate Estimates proceedings. No official information was divulged.

A colleague, Matthew Hyndes (who had troubles of his own with DFAT), also alleged to the Diplomatic Security Branch that Mr Smith had (a) asked him to prepare dot points on DFAT's refusal to grant leave without pay to an officer undertaking UN peacekeeping duties with a view to assisting the Opposition to ask Senate Estimates questions and (b) confided to him that Mr Smith was prepared to help the Opposition to formulate a question on the decision to reduce staff at the Jakarta embassy.

Mr Smith was charged with three breaches of the APS Code of Conduct by failing to uphold the apolitical APS Value and the integrity of the APS in relation to his email to Mr Wells and each of Mr Hyndes' two allegations. A massive investigation involving inspection of 8000 emails and said to have cost more than \$1 million finally led to Mr Smith being found guilty and to his dismissal in July 2006. Mr Smith promptly started proceedings in the Australian Industrial Relations Commission leading to an application that his dismissal was 'harsh, unjust or unreasonable'.

In a comprehensive review of the case Commissioner Deegan's judgment was highly critical of the investigation, including its acceptance of Mr Hyndes' allegations. She found Mr Hyndes was not a credible witness and was "frankly amazed" at the complaisant way DFAT had handled one aspect of its dealings with him.

She ordered Mr Smith's reinstatement with payment of all remuneration and entitlements lost as a result of the termination.

Although not a conclusion drawn by the Commissioner, the facts set out in the judgment lend support to legal commentator Richard Ackland's analysis that Mr Smith was dismissed not for the reasons charged, but because there was a suspicion (which lacked evidence) that he may have leaked a record of a conversation between

Foreign Affairs Minister Alexander Downer and the New Zealand High Commissioner. That conversation concerned Australia's military commitment to Iraq with or without UN approval—a position Mr Downer had publicly denied.

On that analysis Mr Smith's case is an alarming example of the lengths some senior bureaucrats may be prepared to go to provide a head on a plate to appease ministers wounded by leaks—irrespective of justice or the public interest involved.

## **5.9. Commonwealth legislation - shortcomings**

As Commonwealth PID legislation has been identified as the most glaringly inadequate, it is worth examining briefly why this is so. The principal difficulty for Commonwealth public servants who may contemplate whistleblowing arises from s70(1) of the *Crimes Act* 1914 which provides:

(1) A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom he is authorised to publish or communicate it, any fact or document which comes to his knowledge, or into his possession, by virtue of being a Commonwealth officer, and which it is his duty not to disclose, shall be guilty of an offence.

This creates a strict liability offence excluding any opportunity to argue a public interest defence, no matter how compelling. Also, because of its indiscriminating universality in criminalising all unauthorised disclosures it tends to discourage what would be administratively sensible managerial or internal disciplinary action, especially in response to less serious cases. Another malign outcome is that fear of criminal prosecution leads officers (even more senior ones) to meet any request for information—however innocuous—with the dismissive demand to seek the information via FOI. In other words, to get someone else to make the decision irrespective of the delay involved.

Subsection 70(1) is related to Public Service Regulation 2.1 This regulation was substituted for Regulation 7(13) following Federal Court criticism of it by Justice Finn in *Bennett* (see footnote 1). However this new regulation was initially disallowed in the Senate on 16 June 2005 on grounds including that it failed to deal with Justice Finn's criticisms, that it made no reference to the public interest and because of the very broad and ill-defined reach of its subsection (3) preventing disclosure "if it is reasonably foreseeable that the disclosure could be prejudicial to the effective working of government ...". However, the regulation<sup>54</sup> came into force soon after the government attained its Senate majority from 1 July 2005.

The other relevant Commonwealth provision is section 16 of the *Public Service Act* 1999. This section<sup>55</sup> "Protection for whistleblowers" applies only to employees of Australian Public Service agencies which comprise about half of all Commonwealth officials. It makes clear that its protection is confined to those who have made a disclosure to members of the public service hierarchy subject to ministerial control. Presumably for this reason it does not include a disclosure to the Commonwealth Ombudsman.

The net effect of these provisions is to ensure that recognised whistleblowing (with such limited to disclosing breaches of the APS code of conduct) is confined within the public service. Their protection against victimisation of internal whistleblowers is at best aspirational rather than substantive such as that in the NSW *Protected Disclosures Act* 1994 which makes victimisation a criminal offence (punishable by imprisonment and fines) and reverses the onus of proof for employers being prosecuted for taking detrimental action as a reprisal against a whistleblowing officer.

#### **The Ellis case<sup>56</sup>**

In 2005 Peter Ellis was head of AusAID's annual \$40 million operation in East Timor. In that year the Australian government cancelled and refused funding to several East Timorese NGOs because of their criticisms on maritime issues, especially those relating to petroleum rights. The initial ministerial decision was to break a contract with the human rights NGO Forum Tau Matan before any of an agreed \$65,000 payment had been made, when it was discovered that the NGO had signed two media statements critical of Australia over the Timor Sea maritime boundary negotiations.

After the first decision was taken Mr Ellis says he was pressured by senior officers to hide the basis of that and future decisions: preferably to give no reasons, but if needed to give false ones. Mr Ellis argued the truth should be told, but he received instructions from his managers that, if he obeyed them, would have meant outright lies in the first instance and maintaining a secret blacklist of NGOs in continuing cases.

Mr Ellis, despite being advised against doing so by a senior officer, complained to the Australian Public Service Commission (APSC) pursuant to the whistleblower section 16 of the *Public Service Act* 1999 alleging essentially that the instructions were a breach of the APS code of conduct. Section 16 obliges a CEO to protect a whistleblower from victimisation. Mr Ellis subsequently complained about retaliation for having made his complaint, in that his East Timor posting was not extended.

While DFAT and AusAID ultimately agreed to inform East Timorese NGOs of the correct reason for cancellation or refusal of funding, the handling of Mr Ellis's complaints stretched out over two years, first with investigations by DFAT and then reviews by the APSC, finalised by a letter from the APS Commissioner on 6 July 2007 advising that there was insufficient evidence to indicate wrongdoing. Mr Ellis had left AusAID in May 2007. He pressed a series of FOI applications that finally elicited the full APSC review report. A request for the same report from DFAT was denied.

In the absence of any recourse from the APS Commissioner's decision, Mr Ellis has written two articles and placed significant documents on a website. It is clear, particularly from the full APSC report, that DFAT investigations were patently inadequate—a feature also of the Smith case above. The review's failure to conduct any further obvious inquiries that might have rectified initial deficiencies shows the hollowness of the whistleblower protection section 16 purportedly delivered via the APSC.

Not confined to Commonwealth laws, specific secrecy provisions in legislation represent one of the key hurdles discouraging whistleblowers. Below is an outline of the present position which relates to the subsequent topic of shield laws.

### 5.10. Secrecy provisions in legislation

Research carried out on behalf of the audit by Corrs Chambers Westgarth (Melbourne) has shown that, across Australia, there are 335 pieces of legislation which contain so-called secrecy provisions.

A summary is presented in the table below.

<b>Jurisdiction</b>	<b>Acts/regulations containing secrecy provisions</b>
Commonwealth	80
New South Wales	45
Australian Capital Territory	33
Queensland	22
South Australia	16
Tasmania	17
Victoria	45
Western Australia	52
Northern Territory	<u>25</u>
<b>TOTAL</b>	<b>335</b>

Those provisions differ slightly in the sample of legislation we have read but, in general, they prohibit a person from disclosing or communicating, either directly or indirectly, information or documents obtained in the course of performing his or her duties or functions to any other person, except (as specified) within their own agency. The provisions apply in most cases, including after a person leaves the organisation or stops performing certain functions.

In some Acts, particularly those which relate to an agency providing a service such as health, aged or disability support or is one related to national security or intelligence, the officer is not compelled to disclose information even to a court or tribunal except in certain circumstances—if, for example, it is a party to the proceedings. Some acts give the responsible minister or courts or tribunals discretion to divulge certain information.

The penalties for breaching the secrecy provisions can be severe. They can range from a number of penalty points to 25 years for intelligence-related offences. The general penalty is imprisonment for six months to two years and/or a fine.

It is evident from the sample of secrecy provisions that they are usually qualified such that disclosure of information in particular circumstances will not be an offence.

For example:

- where a person is authorised to make such disclosure;
- where the disclosure is made in the course of performing or exercising his or her functions or duties under the relevant Act;
- where the disclosure is permitted by the Minister or agency head who deems it to be in the public interest; or
- where the disclosure is made with the consent or authority of the person who applied to have the information treated as confidential or to whom the information relates.

Annexure A is a list of Acts across Australia that research has identified as containing secrecy provisions.

Given the large number of Acts containing secrecy provisions, the number of cases where breaches have been prosecuted is relatively small.

Examples include the *Kelly* and *Kessing* cases (referred to elsewhere in this chapter). In *Johnston v DPP*,<sup>57</sup> the appellant was an Australian Federal Police constable. He was convicted under the Commonwealth *Crimes Act 1914* of communicating information obtained by virtue of his position to another person. His appeal was dismissed and the orders of the magistrate were confirmed.

In *R v Lappas*,<sup>58</sup> the defendant was found guilty of count 1 espionage contrary to section 78(1)(b) of the *Crimes Act 1914* (Cth) and of count 2 unauthorised communication of two prescribed documents contrary to section 79(1)(b). He was an intelligence analyst with the Defence Intelligence Organisation (DIO). He had prepared a report which was classified “Top Secret”. He met a prostitute, Sherryll Ellen Dowling, and spent two days with her during which time he took the “Top Secret” report from DIO and gave it to her with the names of two informants written on the document. He gave her the report so she could sell it to a particular foreign power that he thought might be willing to pay a substantial sum for it and he gave her instructions about the sale. He and Dowling contacted the foreign power but the foreign power was not interested in the report. The next day he took from DIO copies of two further “Top Secret” documents which he again gave to Dowling so she could sell them to the same foreign power. He unsuccessfully tried to sell these documents to the same foreign power. He later told the DIO security officer what he had done. Police recovered the three documents from Dowling. At trial he was found to have been suffering from a mental illness at the time. He was sentenced to 12 months for count 1 and six months for count 2. The defendant was released immediately on conditions.

The DPP appealed on the ground that the sentences were manifestly inadequate. The Court of Appeal agreed and re-sentenced Lappas to two years’ imprisonment for count 1 and six months imprisonment for count 2 with the respondent to be released after serving six months.

In *Grant v Headland*,<sup>59</sup> the appellant was a 19-year-old probationary trainee of the Australian Security Intelligence Organisation who decided to see what response he could get to an overture to a foreign agency purporting to offer intelligence secrets. The appellant's communication to his chosen agency was discovered. He was charged under sections 79(1) and 79(3) of the *Crimes Act* 1914 (Cth). He was convicted and appealed against the conviction and sentence. The appeal against the conviction was dismissed, but the appeal against the sentence was allowed because the security of the information was low and the appellant's intentions were loyal.

### **5.11. Protection of journalists' sources - 'shield' law**

Journalists in Australia are inadequately served by legislation and the common law in relation to their ability to protect the identity of their sources.

The only specific legislation is section 126B "evidence of protected confidences" of the *Evidence Act* 1995 of both the Commonwealth<sup>60</sup> and NSW. The sections are in the same terms except the Commonwealth's applies (per section 126A) only to journalists and has an additional sub-paragraph requiring overriding weight be given to considerations of national security when a court decides whether to issue a direction that a witness not be obliged to give evidence that would disclose a protected confidence or protected identity information. Section 126B was added to the Commonwealth Act only in 2007.

However, application of section 126B in both Acts is subject to an exception in section 126D. This exception relates to loss of the privilege against disclosure in cases of misconduct. Thus in section 126D misconduct:

"does not prevent the adducing of evidence of a communication made or the contents of a document prepared in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty".

Particularly in relation to the Commonwealth Act, since any unauthorised communication of information is criminalised even where it is a PID, this exception seems bound to apply in nearly all cases of leaks of Commonwealth information to journalists. Hence the privilege apparently offered is a sham.

Otherwise application of section 126B appears to rest on assessing the relevance of the protected information. If identification of the source is clearly relevant it would seem unlikely a judge would exercise discretion to order that the information not be cited where the witness was a journalist, requiring identification of their source.

For this reason section 126B seems to provide little if any more effective protection than the common-law "newspaper rule" derived from the High Court judgment<sup>61</sup> which said:

*Generally speaking, disclosure will not be compelled at an interlocutory stage of a defamation or related action and even at the trial the court will not compel disclosure unless it is necessary to do justice between the parties.*



Although s126B (Cth) had not been enacted at the time of the case that led to the conviction and fining the journalists Michael Harvey and Gerard McManus (see below) for contempt in refusing to name their source, had it applied, this would not have saved them.<sup>62</sup>

### **The Harvey and McManus case<sup>63</sup>**

On 20 February 2004 the *Herald Sun* published an article “Cabinet’s \$500 million rebuff to veterans” by Michael Harvey and Gerard McManus. It suggested the government had agreed to only five of 65 recommendations of a review of veterans’ entitlements and appeared to contain information from confidential Department of Veterans Affairs (DVA) documents. The article was acutely embarrassing for the government. A DVA investigation revealed that during the three days before publication, calls had been made from telephones associated with DVA officer Desmond Kelly to telephones connected with Harvey.

Kelly was charged with the *Crimes Act* 1914 (Cth) offence that he communicated a document which came into his possession by virtue of being a Commonwealth officer and which it was his duty not to disclose.

Harvey and McManus refused to make statements to the police during investigations into the alleged offence. On 23 August 2005 both were called to give evidence in the prosecution of Kelly. Both refused to answer questions on the grounds that to do so might disclose the identity of a confidential source. As a result, on 4 October 2005 both were charged with contempt of court.

Helen Ester commented:

*“The claim that Harvey and McManus were accidental (and politically embarrassing) “collateral damage” carries weight. It is backed by federal secretary of the Media Entertainment and Arts Alliance (MEAA) Chris Warren, who described the charging of the pair as “a train wreck that was waiting to happen” and said that in his view the Howard Government “had clearly decided to crack down on leaked information” but had failed to foresee “the inevitable consequence of this is that journalists will go to jail”.*

On 14 October 2005, the week the trial of Harvey and McManus was due to start, the Attorney-General, Philip Ruddock, intervened, asking the Victorian County Court to reconsider and exercise its discretion to dismiss the contempt charges. His submission “expressed the government’s view that imprisonment would not be an appropriate penalty for the journalists” (quoted by Ester). However, during the sentencing proceedings Chief Judge Michael Rozenes referred to the government’s handling of the case as not just “somewhat confusing”, but it seemed to indicate that “the Commonwealth was suffering from a serious case of schizophrenia” (quoted by Chris Merritt, “Judge’s uppercut gives Canberra a black eye” *The Australian* 26 June 2007, 3).

Kelly was convicted in January 2006 but his conviction was quashed on appeal. At a County Court hearing on 12 February 2007, Harvey and McManus pleaded guilty to contempt. On 25 June 2007 Judge Rozenes convicted them and, after contemplating a custodial sentence, fined each \$7000.

## 5.12. Public interest in protecting journalists' sources

What is the public interest in journalists being able to protect the identity of their sources? The following dicta of the European Court of Human Rights in *Goodwin v UK* (1996) referring to the “chilling effect” of requiring source identification, has been widely quoted, including in subsequent UK cases:

*The court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance. Protection of journalistic sources is one of the basic conditions for press freedom ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.*

In addition to the chilling effect deterring sources from coming forward, another result of the absence of shield law is the “cold feet effect” on journalists. The effect of this is that “stories are either not reported or are reported in a more discreet fashion because of the risk that a journalist may be placed in a position where they are required to reveal their source and thereby run the risk of going to jail”.<sup>64</sup> In Australia these journalists have been jailed, or in one case subject to a community service order, during the past two decades:

Tony Barass (*Sunday Times*—Perth)

Gerard Budd (*Courier-Mail*—Brisbane)

Chris Nicholls (ABC—Adelaide)

Deborah Cornwall (*Sydney Morning Herald*—Sydney) community service order

## 5.13. Rendering Australian shield law hollow

Improving Australian shield laws will be to little effect in relation to government information if the sources whose identity those laws are designed to protect face exposure through a conjunction of political forces. That conjunction, at least at Commonwealth level, involves a dogged refusal to provide substantial legislative protection to whistleblowers together with a relentless determination to track down the source of disclosures which the aforementioned refusal ensures remain “unauthorised”. That determination was perhaps best expressed by Peter Shergold, Secretary of the Prime Minister’s Department, who was quoted as saying “if some people seem surprised that I have called in the police to deal with leaks, they shouldn’t be—I always have and I always will”.<sup>65</sup> The Smith case referred to above is also an example of the vice flowing from poor leadership in the indiscriminating pursuit of all leaks as criminal.

In short, there is ultimately little point in providing a shield for journalists if they are not the ones being bayoneted.

#### **The Kessing case<sup>66</sup>**

On 27 March 2007 a NSW District Court jury convicted Allan Kessing of the offence of revealing information he had gained as a former officer of the Australian Customs Service and “without lawful authority or excuse” for doing so (subsection 70(2) *Crimes Act* 1914). His crime was disclosing the contents of two classified Customs documents containing his threat assessments and risk analyses of airport security in 2003.

These reports, eventually leaked by others to *The Australian*’s Martin Chulov and Jonathan Porter, triggered public criticism and a major review followed by a \$200 million shake-up of Australian airport security. Despite the obvious public interest in such revelations, the trial judge refused to allow Kessing’s barrister to argue to the jury that the eventual disclosure, albeit not by Kessing, was nevertheless in the public interest, and thus afforded him a lawful excuse within the terms of s70.

During the trial it became clear that a decision had been made at senior levels not to pursue the journalists, with all the publicity and opprobrium that might have brought. In the absence of the jury it was revealed the CDPP had decided not to pursue a subpoena against Chulov and Porter. Also, Federal Agent Andrew Perkins gave evidence that senior AFP management decided not to go ahead with a search warrant for the office of *The Australian* although the results could have helped the investigation. However, search warrants were executed at two premises used by Kessing.

Kessing was sentenced to nine months’ jail, suspended on entering a \$1000 good behaviour bond. He has said he intends to appeal against his conviction.

#### **5.14. Overseas ‘shield’ legislation**

Several countries have enacted shield legislation of varying degrees of effectiveness. These brief summaries are from selected jurisdictions of relevance to Australia.

##### New Zealand

The NZ *Evidence Act* 2006 in sections 68-70 gives limited protection to journalists’ sources in that neither a journalist nor their employer can be required to answer any question or give any evidence that would disclose the identity of an informant to whom the journalist has promised anonymity. However, a High Court judge may require disclosure after balancing competing public interests.

## United Kingdom

Section 10 of the UK *Contempt of Court Act* 1981 provides that:

“No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.”

The interpretation of this section was modified by the *Human Rights Act* 1998 (HRA). As attempts to discover the identity of media sources engage Article 10 of the European Convention on Human Rights, “the journalist has a **legal right** to protect her source, which the court is under a duty to observe. Article 10 is a ‘trump’ right”.<sup>67</sup> In this respect, in Convention jurisprudence it is the case that when determining the legality of a measure affecting an Article 10 right, “the court is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted”. *Sunday Times v UK* (1979) 2 E.H.R.R. 245

Ruth Costigan explains the judicial process of the shield laws now as follows:

*So it is not a question of “trading off” or “balancing” competing interests: protection of sources remains the dominant interest, even once the necessity of disclosure, as a question of fact, has been established. The court has to consider whether, in ordering disclosure, it would be acting in pursuit of a legitimate aim. It then has to determine necessity as a question of law, taking cognisance throughout of source protection as the dominant interest. This involves determining necessity as a question of fact, identifying whether there is a pressing social need for disclosure, and establishing that a disclosure order would be a proportionate response to a legitimate aim. The HRA has, then, corrected the failure of s10 to establish protection of journalists’ sources as a primary public interest. While much progress has been made, the courts have not yet given full expression to this primacy.”*<sup>68</sup>

## United States of America

The District of Columbia and 32 states have shield laws providing degrees of protection from qualified to absolute. However, the US Supreme Court has held that such a privilege is not mandated by the US Constitution. While there is yet no federal shield law, the *Free Flow of Information Bill* was in August 2007 voted out of the House Judiciary Committee to the floor of the House for a vote. Bipartisan sponsors Boucher and Pence stressed the Bill was not to protect the press, but rather to protect the public’s right to know.

*The Bill would protect reporters from being forced to divulge their confidential sources, with exceptions for information needed to prevent terrorism or significant harm to national security, information that would prevent ‘imminent death’ or significant bodily injury, information relating to a significant trade secret, or information relating to leaks of personal or financial information*

*revealed in violation of existing federal laws. If one of these four exceptions applies, the Bill would require a court to balance the public interest in compelled disclosure against the interest in newsgathering.*<sup>69</sup>

### **5.15. Alternative approaches to shield legislation**

There are in essence two approaches to shield legislation and the guidance it provides the judiciary. The first rests on the presumption that disclosure of journalists' sources is necessary unless there is some case made out to resist disclosure. In short, the onus is on the journalist. The alternative is that disclosure of sources is not necessary and a case must be made out on the basis of some compelling public interest as to why the presumption against disclosure should be overturned.

Clearly Australia has a long way to go before its legislation embodies the desirable second alternative.

Another problem with existing Australian legislation is that it contains no definition of who is a journalist. This is not straightforward. For example, difficulties can arise in relation to the status of freelance journalists.

### **5.16. Conclusion**

The current state of whistleblowing law in Australia exhibits very substantial differences between the nine jurisdictions relating to the types of disclosers and the nature of disclosures covered, the level and forms of protection provided and the type and severity of penalties for reprisals including breaches of employer obligations.

- Inadequate whistleblower protection laws discourage the making of disclosures that it is in the public interest to be both dealt with by appropriate authorities and to be brought to public knowledge.
- The absence of any really effective shield laws in Australia discourages whistleblowers both initially coming forward and, if an internal disclosure is improperly handled, from disclosing that mishandling to a journalist. The more dangerous the latter course, the less likely the former course will be taken.
- More generally the lack of effective shield laws means that sources are less likely to provide information to the news media thus restricting the volume and accuracy of information in the public domain.
- There is a strong case for uniform PID legislation using a new model Commonwealth law. It is important that this law should at least protect whistleblowers who disclose to the media after a reasonable attempt to have the matter dealt with internally or where such a course was impractical.
- There is a good case for an effective shield law regime based on a presumption that sources should not be revealed and a journalist could only be ordered to do so by a judge on strictly limited grounds of compelling public interest. Uniformity is important here as well with many media operating across more than one jurisdiction.

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- <sup>1</sup> *Bennett v President, Human Rights and Equal Opportunity Commission* [2003] FCA 1433. Finn J at para. 79.
- <sup>2</sup> Major issues of public concern that could be the subject of a PID can be grouped as illegal conduct, corrupt conduct, public wastage, maladministration and dangers to public health, safety and the environment.
- <sup>3</sup> A J Brown and Paul Latimer, "Symbols or Substance? Priorities for the Reform of Australian Public Interest Disclosure Legislation" June 2007, available at <http://ssrn.com/abstract=991710>, page 16
- <sup>4</sup> Brown & Latimer, above, page 16
- <sup>5</sup> Brown & Latimer, above, page 17
- <sup>6</sup> D Lewis, "Whistleblowing Statutes in Australia: Is It Time for a New Agenda?" (2003) 8 Deakin Law Review 318 at page 322
- <sup>7</sup> Brown & Latimer, above, page 6
- <sup>8</sup> A J Brown, "Public interest disclosure legislation in Australia: Towards the next generation?" Discussion Paper 25/06 for Democratic audit of Australia, August 2006, available at [http://arts.anu.edu.au/democraticaudit/papers/20060830\\_whisbl\\_ajbrown.pdf](http://arts.anu.edu.au/democraticaudit/papers/20060830_whisbl_ajbrown.pdf), page 3
- <sup>9</sup> Brown & Latimer, above, pages 7-8
- <sup>10</sup> Brown & Latimer, above, pages 8-9
- <sup>11</sup> Brown & Latimer, above, page 9; Lewis, above, page 320
- <sup>12</sup> Brown & Latimer, above, page 10
- <sup>13</sup> Brown, above, page 3
- <sup>14</sup> Brown & Latimer, above, page 10
- <sup>15</sup> Brown & Latimer, above, page 11
- <sup>16</sup> Brown & Latimer, above, page 9
- <sup>17</sup> Thomas John, "Whistleblowing in Australia – transparency, accountability...but above all, the truth" Parliament of Australia, Department of Parliamentary Services, Research Note, 14 February 2005, no. 31, 2004-05, ISSN 1449-8456, available at <http://www.aph.gov.au/library/pubs/RN/2004-05/05rn31.pdf>, page 2 (cf note 17)
- <sup>18</sup> Brown, above, pages 3-4
- <sup>19</sup> Brown & Latimer, above, page 12
- <sup>20</sup> John, above, page 2
- <sup>21</sup> Lewis, page 323
- <sup>22</sup> Brown & Latimer, above, page 11; Lewis, page 320
- <sup>23</sup> Brown & Latimer, above, page 12
- <sup>24</sup> Brown & Latimer, above, page 12
- <sup>25</sup> Brown, above, page 3
- <sup>26</sup> Brown & Latimer, above, page 14
- <sup>27</sup> Brown & Latimer, above, page 15
- <sup>28</sup> Brown & Latimer, above, page 16
- <sup>29</sup> Lewis, page 321
- <sup>30</sup> Lewis, page 322
- <sup>31</sup> ES Callahan, TM Dworkin and D Lewis, "Whistleblowing: Australian, UK and US Approaches to Disclosure in the Public Interest" (2003-2004) 44 Virginia J International Law 879 at page 898
- <sup>32</sup> Brown & Latimer, above, page 21
- <sup>33</sup> Brown, above, page 4
- <sup>34</sup> Brown & Latimer, above, page 23-24
- <sup>35</sup> Brown, above, page 4
- <sup>36</sup> John, above, page 2
- <sup>37</sup> Callahan et al, page 899 - 901
- <sup>38</sup> Callahan et al, page 891.
- <sup>39</sup> Brown & Latimer, above, page 25
- <sup>40</sup> Brown & Latimer, above, page 26
- <sup>41</sup> John, above, page 2
- <sup>42</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 250; also *Bennett* (above)
- <sup>43</sup> *Re a Company's Application* [1989] 3 WLR 265
- <sup>44</sup> Brown, above, page 3
- <sup>45</sup> Brown, above, page 4
- <sup>46</sup> Lewis, pages 323 to 328; Callahan et al, page 890
- <sup>47</sup> Callahan et al, page 895
- <sup>48</sup> Callahan et al, page 905; ES Callahan, TM Dworkin, and D Lewis, "Who blows the whistle to the media, and why: Organisational Characteristics of Media Whistleblowers" (1994) 32 American Business Law J 151, 170-179
- <sup>49</sup> See further, ES Callahan, TM Dworkin, and D Lewis, D "Employee Disclosures to the Media. When is a 'source' a 'sorcerer'?" 15 Hastings Commercial & Entertainment Law J 357
- <sup>50</sup> Callahan et al, page 882, 893
- <sup>51</sup> Callahan et al, page 893

<sup>52</sup> AJ Brown, "Public interest disclosure legislation in Australia: Towards the next generation?" An Issues Paper for the *Whistling While They Work Project*, November 2006, available at <http://www.griffith.edu.au/centre/srsc/whistleblowing/pdf/ajb-pidla1006-fullreport-final.pdf> page 43

<sup>53</sup> This account is based on the judgment of Commissioner Deegan in *Smith and Department of Foreign Affairs and Trade* [2007] AIRC 765 of 29 September 2007 and Richard Ackland, "Search for leaker that became a witch-hunt", *Sydney Morning Herald*, 12 October 2007, 17

<sup>54</sup> **PUBLIC SERVICE REGULATIONS 1999 - REG 2.1**

**Duty not to disclose information (Act s 13)**

- (1) This regulation is made for subsection 13 (13) of the Act.
- (2) This regulation does not affect other restrictions on the disclosure of information.
- (3) An APS employee must not disclose information which the APS employee obtains or generates in connection with the APS employee's employment if it is reasonably foreseeable that the disclosure could be prejudicial to the effective working of government, including the formulation or implementation of policies or programs.
- (4) An APS employee must not disclose information which the APS employee obtains or generates in connection with the APS employee's employment if the information:
  - (a) was, or is to be, communicated in confidence within the government; or
  - (b) was received in confidence by the government from a person or persons outside the government;

whether or not the disclosure would found an action for breach of confidence.

- (5) Subregulations (3) and (4) do not prevent a disclosure of information by an APS employee if:
  - (a) the information is disclosed in the course of the APS employee's duties; or
  - (b) the information is disclosed in accordance with an authorisation given by an Agency Head; or
  - (c) the disclosure is otherwise authorised by law; or
  - (d) the information that is disclosed:
    - (i) is already in the public domain as the result of a disclosure of information that is lawful under these Regulations or another law; and
    - (ii) can be disclosed without disclosing, expressly or by implication, other information to which subregulation (3) or (4) applies.
- (6) Subregulations (3) and (4) do not limit the authority of an Agency Head to give lawful and reasonable directions in relation to the disclosure of information.

**Note** Under [section 70](#) of the [Crimes Act 1914](#), it is an offence for an APS employee to publish or communicate any fact or document which comes to the employee's knowledge, or into the employee's possession, by virtue of being a Commonwealth officer, and which it is the employee's duty not to disclose.

<sup>55</sup> **Protection for whistleblowers**

- (16) A person performing functions in or for an [Agency](#) must not victimise, or discriminate against, an [APS employee](#) because the [APS employee](#) has reported breaches (or alleged breaches) of the [Code of Conduct](#) to:
  - (i) (a) the [Commissioner](#) or a person authorised for the purposes of this section by the [Commissioner](#); or
  - (ii) (b) the [Merit Protection Commissioner](#) or a person authorised for the purposes of this section by the [Merit Protection Commissioner](#).
  - (iii) (c) an [Agency Head](#) or a person authorised for the purposes of this section by an [Agency Head](#)

<sup>56</sup> This account relies on: Peter Ellis, "Whistleblowing: Lying for Your Country" *New Matilda* 30 May 2007; webdiary: "Peter Ellis on being a whistleblower" at <http://webdiary.com.au/cms/?q=node/2069> with associated documents and references at <http://www.netspeed.com.au/ellispsa/> (both downloaded 8 October 2007)

<sup>57</sup> *Johnston v Director of Public Prosecutions* (1989) 90 ACTR 7

<sup>58</sup> *R v Lappas* [2003] 90 ACTCA 7

<sup>59</sup> *Grant v Headland* (1977) 17 ACTR 29

<sup>60</sup> **EVIDENCE ACT 1995 - SECT 126B**

**Exclusion of evidence of protected confidences**

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- (1) The court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose:
- (iv) (a) a protected confidence; or
- (v) (b) the contents of a document recording a protected confidence; or
- (vi) (c) protected identity information.
- (2) The court may give such a direction:
- (vii) (a) on its own initiative; or
- (viii) (b) on the application of the protected confider or confidant concerned (whether or not either is a party).
- (3) The court must give such a direction if it is satisfied that:
- (ix) (a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced; and
- (x) (b) the nature and extent of the harm outweighs the desirability of the evidence being given.
- (4) Without limiting the matters that the court may take into account for the purposes of this section, it is to take into account the following matters:
- (xi) (a) the probative value of the evidence in the proceeding;
- (xii) (b) the importance of the evidence in the proceeding;
- (xiii) (c) the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding;
- (xiv) (d) the availability of any other evidence concerning the matters to which the protected confidence or protected identity information relates;
- (xv) (e) the likely effect of adducing evidence of the protected confidence or protected identity information, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider;
- (xvi) (f) the means (including any ancillary orders that may be made under [section 126E](#)) available to the court to limit the harm or extent of the harm that is likely to be caused if evidence of the protected confidence or the protected identity information is disclosed;
- (xvii) (g) if the proceeding is a criminal proceeding--whether the party seeking to adduce evidence of the protected confidence or protected identity information is a defendant or the prosecutor;
- (xviii) (h) whether the substance of the protected confidence or the protected identity information has already been disclosed by the protected confider or any other person.

The court must also take into account, and give the greatest weight to, any risk of prejudice to national security (within the meaning of [section 8](#) of the [National Security Information \(Criminal and Civil Proceedings\) Act 2004](#)).

- (5) The court must state its reasons for giving or refusing to give a direction under this section.

<sup>61</sup> *John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR

<sup>62</sup> *R v Gerard Thomas McManus and Michael Harvey* [2007] VCC 619; judgment para. 25; Justin Quill, "Contempt of Court and Journalists' Sources" Paper to the CMCL Courts and Media Conference, Melbourne, 27 July 2007, page 3

<sup>63</sup> This account relies on the judgment cited above and material in Quill (above) and Ester, H "Political journalists, 'leaks' and Freedom of Information" *Australian Journalism Review* 28(1) pages 157-166

<sup>64</sup> Quill (above) page 8

<sup>65</sup> Quoted by David Marr, "His Master's Voice" Quarterly Essay 26, (2007) Black Inc. (Melbourne) page 55 from an address by Peter Shergold to the Australian Graduate School of Management in November 2004.

<sup>66</sup> This account relies on material in AJ Brown, "Privacy and the public interest disclosure: when is it reasonable to protect whistleblowing to the media?" *Butterworths Privacy Law Bulletin* (2007) 4(2) P19 and Margaret Simons, *Crikey* 28 March 2007 see [www.crikey.com.au](http://www.crikey.com.au)

<sup>67</sup> Ruth Costigan, "Protection of journalists' sources" 2007 *Public Law* 464

<sup>68</sup> Costigan (above)



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<sup>69</sup> The Reporters Committee for Freedom of the Press: news release 2 August 2007 see <http://www.rcfp.org/news/2007/0802-con-housej.html>

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## CHAPTER 5

### PROTECTING WHISTLEBLOWERS AND JOURNALISTS' SOURCES

#### ANNEXURE A: SECRECY PROVISIONS IN AUSTRALIAN LEGISLATION

Commonwealth Legislation
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*Aboriginal and Torres Strait Islander Act 2005* – Section 191 Secrecy and Section 193S Secrecy and Section 23E

*Administrative Appeals Tribunal Act 1975* – Section 66 Confidential information not to be disclosed

*Administrative Decisions (Judicial Review) Act 1977* – Section 128 Continuation of secrecy obligations

*Aged Care Act 1997* – Section 86-2 Use of Protected information

*Anti-Money Laundering and Counter-Terrorism Financing Act 2006* – Part 11 Secrecy and access\Division 2–Secrecy

*Auditor-General Act 1997* - Part 5 - Information-gathering powers and secrecy

*Australian Crime Commission Act 2002* - Division 3–Administrative provisions\Subdivision D–Secrecy – Section 51 Secrecy

*Australian Federal Police Act 1979* - Part V–Professional standards and AFP conduct and practices issues \ Division 9–Secrecy – Section 40ZA Secrecy

*Australian Federal Police Act 1979* – Section 60A Secrecy

*Australian Film Commission Act 1975* – Section 43 Members of Commission etc. to observe secrecy

*Australian Institute of Health and Welfare Act 1987* – Section 29 Confidentiality

*Australian Prudential Regulation Authority Act 1998* – Section 56 Secrecy–general obligations

*Australian Postal Corporation Act* – Section 90H Secrecy

*Australian Security Intelligence Organisation Act 1979* - Part IV–Security assessments\Division 4–Review of security assessments\Section 81 Secrecy and Section 92 Publication of Identity of Officer of Organisation

*Australian Trade Commission Act 1985* - Section 94 Secrecy

*Banking Act 1959* - Division 1BA–APRA’s power to issue directions\Subdivision C–General provisions relating to all directions\Section 11CF Secrecy requirements

*Census and Statistics Act 1905* - Part IV–Administration\Section 19 Secrecy

*Chemical Weapons (Prohibition) Act 1994* – Section 102 Secrecy

*Child Support (Assessment) Act 1989* – Section 150 Secrecy

*Child Support (Registration and Collection) Act 1988* - Administration\Section 16 Secrecy

*Civil Aviation Act 1998* – Section 32AP – Copying or disclosing CVR information.

*Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992* - Section 14 Secrecy

*Commonwealth Functions (Statutes Review) Act 1981*\Section 234 Obligation of secrecy to continue

*Comprehensive Nuclear Test-Ban Treaty Act 1998* - Section 74 Secrecy

*Crimes Act 1914* – Section 79(3) - Official Secrets

*Crimes (Taxation Offences) Act 1980* - Section 4 Secrecy

*Criminal Code 1995* – Section 91.1 Espionage and similar activities and Section 91.2 Defence

*Dairy Industry Service Reform Act 2003* - Schedule 1–Amendments and repeals\Part II–Provision of services to the dairy industry\Division 4–Other provisions\79C Report to Minister – Section 128 Continuation of secrecy obligations...

*Dairy Produce Act 1986* - Section 119 Secrecy

*Disability Services Act 1986* - Provision of rehabilitation services by the Commonwealth\Section 28 Secrecy and Section 29 Offences against secrecy provision indictable offences

*Environment Protection (Alligator Rivers Region) Act 1978* - Section 31 Secrecy

*Epidemiological Studies (Confidentiality) Act 1981* - Section 4 Secrecy relating to prescribed studies

*Epidemiological Studies (Confidentiality) Act 1981* - Section 6 Secrecy relating to certain documents

*Epidemiological Studies (Confidentiality) Act 1981* - Section 10 Oaths and declarations of secrecy

*Export Finance and Insurance Corporation Act 1991* - Section 87 Secrecy

*Fringe Benefits Tax Assessment Act 1986* - Part II–Administration\Section 5 Secrecy

*Gene Technology Act 2000* – Section 187 – Confidential Commercial Information must not be disclosed

*Health Insurance Act 1973* – Section 130 Officers to observe secrecy

*Higher Education Funding Act 1988* - Chapter 4–Higher Education Contribution Scheme\Part 4.4–Repayment of loans\Section 78 Secrecy

*Higher Education Funding Act 1988* - Chapter 4A–Post-graduate education loan scheme\Section 98K Secrecy

*Higher Education Funding Act 1988* - Chapter 4B–Bridging for overseas-trained professionals (BOTP) loan scheme - Section 98ZD Secrecy

*Higher Education Funding Act 1988* - Chapter 5–Open Learning Deferred Payment Scheme\Section 106F Secrecy

*Higher Education Funding Act 1988* - Chapter 5A–Repayment of loans made under Chapters 4, 4A, 4B and 5\Part 5A.3–Discharge of Indebtedness\Section 106ZA Secrecy

*Higher Education Funding Act 1988* – Chapter 5B–Limit on student debt to Commonwealth\Part 5B.6–Secrecy

*Higher Education Funding Act 1988*–Limit on student debt to Commonwealth\Part 5B.6–Secrecy\Section 106ZK Secrecy

*Income Tax Assessment Act 1936* – Part II–Administration\16 Officers to observe secrecy

*Inspector-General of Intelligence and Security Act 1986* - Section 34 Secrecy

*Inspector-General of Taxation Act 2003* - Section 37 Secrecy

*Insurance Acquisitions and Takeovers Act 1991* - Section 75 *APRA Act* secrecy provisions apply

*Insurance Act 1973* - Section 125 *APRA Act* secrecy provisions apply

*Intelligence Services Act 2001* – Section 9 Offences relating to publishing or disclosing evidence or documents

*Law Enforcement (AFP Professional Standards and Related Measures) Act 2006* - Schedule 1–Main amendments Division 9 Secrecy

*Law Enforcement (AFP Professional Standards and Related Measures) Act 2006* - Section 40ZA Secrecy

*Life Insurance Act 1995* - Part 10A–Prudential standards and directions\Division 2–Directions\Section 230E Secrecy requirements

*Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* - Section 29 APRA Act secrecy provisions apply

*Medical Indemnity Act 2002* - Section 77 Officers to observe secrecy

*National Health Act 1953* - Part VII–Pharmaceutical benefits\Division 3–Payment for supply of pharmaceutical benefits\Section 98E Secrecy

*National Health Act 1953* - Section 135A Officers to observe secrecy

*Petroleum Resource Rent Tax Assessment Act 1987* - Part III–Administration\Section 17 Secrecy

*Pooled Development Funds Act 1992* - Section 71 Secrecy

*Port Statistics Act 1977* – Section 7 Officers to observe secrecy

*Public Service Act 1999* – Section 13(10) -The APS Code of Conduct

*Referendum (Machinery Provisions) Act 1984* - Part X–Offences\Section 116 Officers and scrutineers to observe secrecy

*Renewable Energy (Electricity) Act 2000* - Part 12 Secrecy

*Reserve Bank Act 1959* - Section 79A Secrecy

*Social Welfare Commission (Repeal) Act 1976* - Section 8 Secrecy

*Student Assistance Act 1973* - Financial supplement for tertiary students \ Division 6–Indebtedness existing after termination date\Section 12ZU Secrecy

*Superannuation (Government Co-contribution for Low Income Earners) Act 2003* - Section 53 Secrecy

*Superannuation (Resolution of Complaints) Act 1993* - Section 63 Secrecy

*Superannuation (Unclaimed Money and Lost Members) Act 1999* - Part 6 Secrecy

*Superannuation Contributions Tax (Assessment and Collection) Act 1997* - Section 32 Secrecy

*Superannuation Guarantee (Administration) Act 1992* - Section 45 Secrecy

*Superannuation Industry (Supervision) Act 1993* - Section 252C Secrecy–general obligations

*Taxation (Interest on Overpayments and Early Payments) Act 1983* - Section 8 Secrecy

*Taxation Administration Act 1953* - Section 8XB Secrecy

*Termination Payments Tax (Assessment and Collection) Act 1997* - Section 23 Secrecy

*Trade Practices Act 1974* - Section 95ZP Secrecy: members or staff members of the Commission etc.

*Wool Legislation (Repeals and Consequential Provisions) Act 1993* - Section 20 Officers to observe secrecy

Australian Prudential Regulation Authority Regulations 1998 – Section 5 Secrecy – disclosure of protected information or production of protected document to specified agencies (Act s 56 (5))

Commonwealth Banks Regulations - Section 34 Secrecy

Commonwealth Inscribed Stock Regulations - REG61 Secrecy

Fisheries Management Regulations 1992 - 1992 No 20 - Section 36 Secrecy

Torres Strait Fisheries Regulations 1985 - 1985 No 9 - Regulation of fishing\Section 13 Secrecy

New South Wales Legislation
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*Administrative Decisions Legislation Amendment Act 1997* – Section 35  
*Administrative Decisions Tribunal Act 1997* – Section 108  
*Agricultural Tenancies Act 1990* – Section 26G  
*Anti-Discrimination Act 1977* – Section 124A Secrecy  
*Biofuel (Ethanol Content) Act 2007* – Section 21 Secrecy  
*Casino Control Act 1992* - Section 148 Secrecy  
*Co-Operatives Act 1992* – Section 431 Secrecy  
*Community Justice Centres Act 1983* – Section 29 Secrecy  
*Community Land Management Act 1989* – Section 70 Secrecy  
*Companies (Administration) Act 1981* - Part 2 - Corporate Affairs Commission  
*Consumer Credit Administration Act 1995* - Section 45 Secrecy  
*Consumer, Trader And Tenancy Tribunal Act 2001* Section 63 Secrecy  
*Fair Trading Act 1987* – Section 22 Preservation of secrecy  
*Financial Transaction Reports Act 1992* Section 10 Secrecy  
*Gambling (Two-Up) Act 1998* – Section 29 Secrecy  
*Gaming Machines Act 2001* – Section 206 Secrecy  
*Gas Industry Restructuring Act 1986* – Section 132 Secrecy  
*Government and Related Employees Appeal Tribunal Act 1980* – Section 51 Offences relating to secrecy of information  
*Grain Marketing Act 1991* – Section 92 Secrecy  
*Greyhound and Harness Racing Administration Act 2004* – Section 42 Secrecy  
*Independent Commission Against Corruption Act 1988* – Section 111 Secrecy  
*Land And Environment Court Act 1979* – Section 61J Secrecy  
*Land Development Contribution Management Act 1970* – Section 64 Secrecy  
*Legal Aid Commission Act 1979* – Section 60F Secrecy  
*Liquor Act 1982* – Section 155A Secrecy  
*New South Wales Crime Commission Act 1985* – Section 29 Secrecy  
*Parliamentary Electorates and Elections Act 1912* – Section 135 Violation of secrecy by officers  
*Police Integrity Commission Act 1996* – Section 56 Secrecy  
*Police Integrity Commission Act 1996* – Section 75B Duty to notify Commission of possible corrupt conduct of administrative officers  
*Public Finance and Audit Act 1983* – Section 38 Secrecy  
*Public Lotteries Act 1996* - Section 80 Secrecy  
*Registered Clubs Act 1976* – Section 72C Secrecy  
*Residential Parks Act 1998* - Part 11 Dispute resolution\93 Secrecy  
*Rice Marketing Act 1983* - Section 153 Secrecy  
*Royal Commission (Police Service) Act 1994* –Part 6 Secrecy, disclosure, admissibility, Section 30 Secrecy  
*State Records Act 1998* – Section 34 Secrecy and other duties do not prevent compliance with this Part  
*Strata Schemes Management Act 1996* -Part 2 Mediation and resolution of disputes by Director-General\133 Secrecy  
*Taxation Administration Act 1996* - Part 9 Tax officers, investigation and secrecy provisions Division 3 Secrecy  
*Totalizator Act 1997* - Section 105 Secrecy

*Transport Appeal Boards Act 1980* - Part 3 Appeals - Section 27 Offences relating to secrecy of information  
*Travel Agents Act 1986* – Section 54 Secrecy  
 Local Government (General) Regulation 2005 - Part 11 Elections\Division 10 Offences\364 Breach of secrecy  
 Police Regulation 2000 - Part 4 Members of the NSW Police Force generally\46 Confidential information  
 Public Authorities (Financial Arrangements) Regulation 2005 - Part 2 Securities\Division 5 Miscellaneous\47 Secrecy  
 Rural Lands Protection (General) Regulation 2001 - Part 7 Offences\33 Breach of secrecy

Australian Capital Territory Legislation
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*Architects Act 2004 (ACT)* - Section 84  
*Associations Incorporation Act 1991* - Part 8 Investigation of association's affairs\100 Secrecy  
*Australian Crime Commission (ACT) Act 2003* – Section 46 Secrecy  
*Children and Young People Act 1999* – Section 405C Offence–secrecy of protected information...  
*Consumer and Trader Tribunal Act 2003* - Part 7 Enforcement and offences – Section 59 Secrecy  
*Consumer Credit (Administration) Act 1996* – Section 134 Secrecy  
*Cooperatives Act 2002* – Part 17 Offences and proceedings – Section 449 Secrecy  
*Crimes Act 1900* – Section 153  
*Crimes (Child Sex Offenders) Act 2005* – Section 121 Offence–secrecy  
*Crimes (Restorative Justice) Act 2004* – Section 64 Secrecy  
*Dangerous Substances Act 2004* – Section 211 Secrecy  
*Discrimination Act 1991* Section 121 Secrecy  
*Drugs of Dependence Act 1989* – Section 201 Secrecy  
*Epidemiological Studies (Confidentiality) Act 1992* – Section 4 Secrecy relating to prescribed studies and Section 6 Secrecy relating to certain documents and Section 10 Oaths and declarations of secrecy  
*Fair Trading (Consumer Affairs) Act 1973* - Part 3 Commissioner for fair trading\Division 3.2 Investigations\15 Secrecy  
*First Home Owner Grant Act 2000* – Section 50 Secrecy  
*Food Act 2001* – Section 145 Secrecy  
*Gambling and Racing Control Act 1999* - Part 4 Powers of investigation\Division 4.4 Secrecy  
*Guardianship and Management of Property Act 1991* – Section 66D Secrecy  
*Health Act 1993* -Part 8 Secrecy – Section 125 Offence–secrecy of protected information.  
*Health Professionals Act 2004* - Part 13 Protection and information\129 Secrecy  
*Human Rights Commission Act 2005* – Section 99 Secrecy  
*Intoxicated People (Care and Protection) Act 1994* – Section 36 Secrecy  
*Legal Aid Act 1977* – Section 92 Secrecy and Section 92AA General exceptions to secrecy provisions  
*Mediation Act 1997* Section 10 Secrecy  
*Mental Health (Treatment and Care) Act 1994* – Section 86A Secrecy  
*Partnership Act 1963* – Section 95 Secrecy

*Public Advocate Act 2005* – Section 16 Secrecy  
*Public Sector Management Act 1994* – Section 9  
*Taxation Administration Act 1999* - Part 9 Tax officers, investigation and secrecy provisions (provisions 73 to 99).  
*Territory Records Act 2002* – Sections 52 Secrecy and 53 Secrecy about information acquired under other Acts  
*Victims of Crime Act 1994* – Section 11 Secrecy  
*Workers Compensation Act 1951* – Section 200 Secrecy

Northern Territory Legislation
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*Adoption of Children Act* - Offences – Section 72. Secrecy to be observed  
*Associations Act 2007*- Section 6 Secrecy  
*Audit Act 2002* Section 23 Secrecy  
*Australian Crime Commission (Northern Territory) Act 2005* – Section 44 Secrecy and Section 63 Secrecy obligations  
*Co-Operatives Act* – Section 447 Secrecy  
*Community Justice Centre Act 2005* - Section 36 Secrecy  
*Community Welfare Act 2007* Section 97 Secrecy to be observed  
*Construction Industry Long Service Leave And Benefits Act 2005* - Division 6 – Other administrative matters\90 Secrecy  
*Consumer Affairs and Fair Trading Act* - Part 14 – Pawn-Brokers and Second-Hand Dealers\Division 5 – Miscellaneous\328 Secrecy and PART 15 – Miscellaneous\335 Secrecy (former s235)  
*Criminal Property Forfeiture Act* - Part 3 – Investigation and Search\Division 5 – Secrecy requirements  
*Financial Transaction Reports Act 1992* – Section 9 Secrecy  
*Gaming Control Act* – Section 71 Secrecy  
*Gaming Machine Act* – Section 22 Secrecy  
*Health And Community Services Complaints Act* – Section 95 Giving of information protected  
*Legal Aid Act* – Section 55 Secrecy  
*Mental Health And Related Services Act* – Section 139 Secrecy provision  
*Mineral Royalty Act* - Section 50 Secrecy  
*Northern Territory Aboriginal Sacred Sites Act* - Part IV– Offences, Penalties and Procedures – Section 38 Secrecy  
*Partnership Act* – Section 97 Secrecy  
*Pay-Roll Tax Act* – Section 5 Secrecy  
*Price Exploitation Prevention Act* – Section 8 Secrecy  
*Public Trustee Act* – Section 11 Secrecy  
*Superannuation Act* – Section 8 Secrecy  
*Taxation (Administration) Act* – Section 7 Secrecy  
*Trade Measurement Administration Act* – Section 19 Secrecy

Queensland Legislation
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*Australian Crime Commission (Queensland) Act 2003* – Sections 46 Secrecy and 65 Secrecy obligations  
*Building and Construction Industry (Portable Long Service Leave) Act 1991* – Section 104 Secrecy  
*Consumer Credit (Queensland) Act 1994* – Section 61 Secrecy



*Cooperatives Act 1997* – Section 456 Secrecy  
*Crime and Misconduct Act 2001* – Section 213 Secrecy  
*Dispute Resolution Centres Act 1990* – Section 37 Secrecy  
*Fair Trading Act 1989* – Section 110 Preservation of secrecy  
*Financial Intermediaries Act 1996* – Section 239 Secrecy  
*Financial Transaction Reports Act 1992* – Section 10 Secrecy  
*Land Tax Act 1915* – Section 4A Secrecy  
*Legal Aid Queensland Act 1997* – Section 26 Conferencing chairperson to maintain secrecy and section 82 Secrecy  
*Local Government Act 1993* – Section 813 Secrecy  
*Ombudsman Act 2001* – Section 92 Secrecy  
*Parliamentary Commissioner Act 1974* – Section 22 Secrecy  
*Police Powers and Responsibilities Act 2000* – Section 744 Secrecy  
*Police Service Administration Act 1990* – Section 14 Secrecy  
*Public Records Act 2002* – Section 51 Secrecy provisions in other laws  
*Public Sector Ethics Act 1994* – Section 33 Secrecy  
*Queensland Competition Authority Act 1997* – Section 240 Secrecy  
*Statistical Returns Act 1896* – Section 6 Secrecy  
*Trade Measurement Administration Act 1990* – Section 22 Secrecy  
*Travel Agents Act 1988* – Section 46 Secrecy

South Australia Legislation
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*Associations Incorporation Act 1985* – Section 17 Secrecy  
*Australian Crime Commission (South Australia) Act 2004* – Section 44 Secrecy  
*Co-Operatives Act 1997* – Section 443 Secrecy  
*Dangerous Substances Act 1979* – Section 9. Secrecy  
*Fair Trading Act 1987* – Section 11 Secrecy  
*Financial Transaction Reports (State Provisions) Act 1992* – Section 9 Secrecy  
*Gift Duty Act 1968* – Section 8 Secrecy  
*Legal Services Commission Act 1977* – Section 31A Secrecy  
*Ombudsman Act 1972* – Section 20 No obligation on persons to maintain secrecy, Section 21 Protection for proceedings in Cabinet and Section 22 Secrecy  
*Petroleum Act 2000* – Section 135 Secrecy  
*Police (Complaints and Disciplinary Proceedings) Act 1985* – Section 48 Secrecy  
*Public Sector Management Act 1995* – Section 57 General Rules of Conduct  
*Prices Act 1948* – Section 8 Secrecy  
*Taxation Administration Act 1996* – Division 3 Secrecy  
*Telecommunications (Interception) Act 1988* – Section 11 Secrecy  
*Trade Standards Act 1979* – Section 17 Secrecy

Tasmania Legislation
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*Alternative Dispute Resolution Act 2001* – Section 11 Secrecy  
*Auctioneers and Real Estate Agents Act 1991* - PART 8 - Auctioneers and Real Estate Agents Guarantee Fund\Division 4 - Audit and report\93 Secrecy  
*Australian Crime Commission (Tasmania) Act 2004* – Section 44 Secrecy  
*Australian Crime Commission (Tasmania) Act 2004* – Section 11 Secrecy obligations  
*Commissioner for Corporate Affairs Act 1980* – Section 6E Secrecy  
*Consumer Affairs Act 1988* – Section 22 Preservation of secrecy  
*Cooperatives Act 1999* - Part 17 - Offences and proceedings – Section 449 Secrecy

*Financial Transaction Reports Act 1993* – Section 10 Secrecy  
*Gaming Control Act 1993* - Section 157 Secrecy  
*Land Valuation Act 1971* - Section 10 Secrecy  
*Sale of Hazardous Goods Act 1977* – Section 12 Maintenance of secrecy by members and officers  
*Tasmanian Development Act 1983* – Section 45 Requirement for secrecy  
*Tasmanian Government Insurance Act 1919* – Section 11 Members and officers bound to secrecy  
*Taxation Administration Act 1997* –Division 2 - Secrecy  
*Threatened Species Protection Act 1995* – Section 59 Secrecy  
*Valuation of Land Act 2001* – Section 8 Secrecy  
*Workers Rehabilitation and Compensation Act 1988* – Section 158 Maintenance of secrecy

Victorian Legislation
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*Accident Compensation (Further Amendment) Act 1996* – Section 28 Secrecy  
*Accident Compensation Act 1985* – Section 155 Secrecy provisions and Section 244 Secrecy provisions applying to Part 7  
*Agricultural and Veterinary Chemicals (Control of Use) Act 1992* – Section 62B Secrecy  
*Australian Crime Commission (State Provisions) Act 2003* – Section 44 Secrecy and section 63 Secrecy obligations  
*Business Franchise (Tobacco) Act 1974* –Section 5 Secrecy provisions  
*Business Licensing Authority Act 1998* – Section 18 Secrecy  
*Co-operative Housing Societies Act 1958* – Section 72B Secrecy  
*Co-operatives Act 1996* - No. 84/1996 – Section 451 Secrecy  
*Commissioner for Law Enforcement Data Security Act 2005* – Section 15 Secrecy  
*Confiscation Act 1997* – Section 140 Secrecy  
*Corrections Act 1986* – Section 30 Secrecy and Section 36 Secrecy  
*Credit (Administration) Act 1984* – Section 15 Secrecy  
*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* – Section 62 Secrecy  
*Disability Act 2006* - Section 36 Secrecy provision and Section 128 Secrecy  
*Emergency Services Telecommunications Authority Act 2004* – Section 33 Secrecy  
*Equal Opportunity Act 1995* – Section 192 Secrecy  
*Extractive Industries Development Act 1995* – Section 53 Secrecy  
*Fisheries Act 1995* – Section 146 Secrecy provision  
*Flora and Fauna Guarantee Act 1988* – Section 66 Secrecy  
*Food Act 1984* – Section 54 Secrecy  
*Gaming Acts (Miscellaneous Amendment) Act 1997* – Section 28 Secrecy  
*Health Records Act 2001* – Section 90 Secrecy  
*Health Services Act 1988* – Section 126 Secrecy provision.  
*Housing Act 1983* – Section 128 Secrecy  
*Information Privacy Act 2000* – Section 67 Secrecy  
*Juries Act 2000* – Section 65 Secrecy  
*Legal Profession Act 2004* – Section 3.3.49 Secrecy and Section 7.2.9 Secrecy  
*Livestock Disease Control Act 1994* – Section 107C Secrecy  
*Local Government Act 1989* – Section 60 Infringement of secrecy  
*Major Crime (Investigative Powers) Act 2004* – Section 68 Secrecy

*Mental Health Act 1986* - Section 35 Secrecy provision and 63 Secrecy provision and 117 Secrecy provision  
*Mineral Resources (Sustainable Development) Act 1990* – Section 119 Secrecy  
*Prostitution Control Act 1994* – Section 87 Secrecy  
*Securities Industry Act 1975* – Section 13 Secrecy  
*Stamps (Further Amendment) Act 1993* – Section 8 Secrecy provisions  
*State Taxation (Amendment) Act 1994* – Section 23 Secrecy  
*State Trustees (State Owned Company) Act 1994* – Section 17 Secrecy provision  
*Taxation (Interest on Overpayments) Act 1986* – Section 5 Secrecy provisions  
*Taxation Administration Act 1997* - Part 9 - Tax Officers, Investigation and Secrecy Provisions (provisions 62 to 95)  
*Transport Accident (General Amendment) Act 1994* – Section 53 Secrecy and Section 60  
*Road Safety Act 1986* - secrecy  
*Veterinary Practice Act 1997* – Section 77 Secrecy  
*Victorian Civil and Administrative Tribunal Act 1998* – Section 34 Secrecy  
Casino Control (Prescribed Authorities and Persons) Regulations 2002 - Section 4. Secrecy–divulging information to prescribed authorities and persons...  
Friendly Societies (Amendment) Regulations 1999 – Section 4 Secrecy  
Motor Car Traders (Amendment) Regulations 2003 – Section 11 Secrecy

Western Australia Legislation
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*Aboriginal Heritage Act 1972* – Section 56 Secrecy  
*Australian Crime Commission (Western Australia) Act 2004* – Section 44 Secrecy and Section 64 Secrecy obligations  
*Casino Control Act 1984* – Section 13 Secrecy  
*Chicken Meat Industry Act 1977* – Section 20 Secrecy  
*Companies (Administration) Act 1982* – Section 17 Secrecy  
*Construction Industry (Portable Paid Long Service Leave) Act 1985* - Section 54 Secrecy  
*Corruption and Crime Commission Act 2003* -Part 9 – Disclosure, secrecy and protection of witnesses (provisions 151 to 156)  
*Credit (Administration) Act 1984* Section 56 Secrecy  
*Criminal Code Act Compilation Act 1913* – Section 104 Secrecy offences  
*Criminal Property Confiscation Act 2000* - Division 5 – Secrecy requirements (provisions 70 to 72)  
*Education Service Providers (Full Fee Overseas Students) Registration Act 1991* – Section 40 Secrecy  
*Environmental Protection Act 1986* – Section 120 Secrecy  
*Finance Brokers Control Act 1975* – Section 88 Secrecy  
*Financial Transaction Reports Act 1995* – Section 10 Secrecy  
*Gaming and Wagering Commission Act 1987* – Section 20 Reports, secrecy, etc.  
*Gold Corporation Act 1987* – Section 74 Secrecy and security of records of Gold Corporation and its subsidiaries  
*Health Act 1911* –Section 246ZM Secrecy  
*Housing Societies Act 1976* – Section 8 Secrecy  
*Industry and Technology Development Act 1998* – Section 3 Secrecy  
*Insurance Commission of Western Australia Act 1986* – Section 42 Secrecy  
*Juries Act 1957* – Section 34 Duty of secrecy in summoning jurors.  
*Land Valuers Licensing Act 1978* – Section 33 Secrecy

*Legal Aid Commission Act 1976* – Section 64 Secrecy  
*Liquor Control Act 1988* – Section 152 Obligation of secrecy  
*Minerals and Energy Research Act 1987* – Section 35 Secrecy and Section 41 Savings for secrecy provisions  
*Nuclear Activities Regulation Act 1978* – Section 10 Secrecy  
*Parliamentary Commissioner Act 1971* - Section 23 Secrecy  
*Pawnbrokers and Second-hand Dealers Act 1994* – Section 95 Secrecy  
*Pearling Act 1990* – Section 62 Secrecy of information  
*Petroleum Products Pricing Act 1983* – Section 33 Secrecy  
*Public Sector Management Act 1994* – Section 80 Secrecy  
*Radiation Safety Act 1975* – Section 49 Secrecy  
*Real Estate and Business Agents Act 1978* – Section 138 Secrecy  
*Regional Development Commissions Act 1993* – Section 30 Secrecy  
*Retail Trading Hours Act 1987* – Section 32 Secrecy  
*Royal Commission (Police) Act 2002* – Section Part 4 – Secrecy, disclosure and admissibility  
*Securities Industry Act 1975* – Section 13 Secrecy  
*Security and Related Activities (Control) Act 1996* – Section 8 Secrecy  
*Sentence Administration Act 2003* – Section 119 Secrecy  
*Settlement Agents Act 1981* – Section 116 Secrecy  
*State Administrative Tribunal Act 2004* – Section 157 Secrecy  
*Statistics Act 1907* – Section 17 Officers to observe secrecy and Section 18 Secrecy of returns  
*Transport Co-ordination Act 1966* – Section 42F Secrecy  
*Travel Agents Act 1985* – Section 52 Secrecy  
*Valuation of Land Act 1978* – Section 13 Secrecy  
*Waterways Conservation Act 1976* – Section 66 Secrecy  
*Western Australian Products Symbol Act 1972* – Section 12 Secrecy  
*Western Australian Tourism Commission Act 1983* – Section 22 Secrecy  
*Witness Protection (Western Australia) Act 1996* - Part 3 – Secrecy and disclosure  
 Metropolitan (Perth) Passenger Transport Trust Debentures and Inscribed Stock Regulations 1958 – Section 36.  
 Police Force Regulations 1979 – Rule 607

## **CHAPTER 6**

### **FREEDOM OF INFORMATION**

#### **EXECUTIVE SUMMARY**

FOI laws work effectively and reasonably consistently when they are used to provide access to personal information about the applicant. A range of factors limit their effectiveness in ensuring access to documents relevant to government accountability—the very reason they were set up in the first place.

No government, federal, state or territory, has taken sustained measures to deal with an enduring “culture of secrecy” still evident in many agencies. There are few visible, consistent advocates of open government principles, within government systems and leadership on FOI is lacking.

FOI performance is patchy across all governments. In some agencies applications are managed in a professional manner and decisions on access reflect the law, its spirit and intent. In other cases the FOI process involves delay, high cost, and what could be seen to be obstruction, often suggesting attempts to protect politically sensitive information.

#### **Delay**

- Some requests can take months or even years to resolve despite the fact that a limited statutory deadline applies to the processing of applications.
- A request in April 2005 to the Department of Defence for documents on Australia’s position regarding rendition is still awaiting a determination.
- An application was made for the results of public opinion surveys carried out for the Department of Employment and Workplace Relations to assess the success of about \$32 million spent advertising the WorkChoices law. The department deferred access until later this year, presumably after the election. The reason for the delay was that a government committee wanted to see all the results of the surveys together. The department decided to withhold them all until such time. Using this argument, no results of any surveys ever need be released provided the government claims to have plans to conduct further surveys.
- In 2005-2006, 25 per cent of applications to federal agencies for non-personal documents took longer than 90 days to process, three times longer than the statutory time of 30 days. The Victorian Ombudsman reported only 56 per cent of decisions by government departments in 2003 were made within the statutory time of 45 days. Nearly 21 per cent of decisions took more than 90 days. Over 40 per cent of requests being handled by Victoria Police at any time during the period covered by the Ombudsman’s review were taking more than 45 days.

## High cost

- The *Herald Sun* abandoned a two-year campaign seeking information about travel of federal politicians after it was quoted a fee of \$1.25 million, which amounted to 32 years of full-time work for a public servant. The Administrative Appeals Tribunal accepted that those named in the list would need to be consulted before disclosure, but the Government was entitled to seek payment for the time spent in consultation and decision-making.
- Decision making time chargeable to the applicant can run to hundreds of hours and thousands of dollars in charges. Included in an estimate of fees of \$12,718 for access to documents about the effect of global warming on the Great Barrier Reef are charges for 538.95 hours for making a decision on the status of the documents.

## Federal – State Differences

Associate Professor Anne Twomey of the University of Sydney School of Law carried out research on the *Australia Acts* 1986. The Acts were passed by all Australian parliaments to sever residual links with the United Kingdom. She reported:

*The Commonwealth was a completely different story [from other jurisdictions involved]. After a bureaucratic process of meetings, submissions, reports, consultations, vettings, demands for ASIO security clearances, and scandalous delays lasting almost three years, only a small proportion of the Commonwealth's documents, described by officials as 'the innocuous ones', were released by the Commonwealth Attorney-General's Department. The Prime Minister's own department still has not managed to release a document after three years. Access to legal opinions was also formally denied by the Attorney-General's Department, despite the fact that they were more than 20 years old. In contrast, the states, the United Kingdom and the Special Committee of Solicitors-General released their legal opinions.*

The existence of powers in the Federal Act for the issue of conclusive or ministerial certificates, and limited rights of review of the decision to issue a certificate, is inconsistent with the scheme of the legislation.

## Common Problems

Claims that FOI is achieving its intended purpose, including opening government activities to scrutiny and criticism, are not substantiated by the evidence.

In the federal arena in particular, FOI is marked by a high degree of legal technicality which dominates considerations about whether disclosure is in the public interest, or may demonstrate harm to an essential public interest.

There are inadequacies in the design of the laws; too much scope for interpretation of exemption provisions in ways that lead to refusal of access to documents about matters of public interest and concern; cost barriers to access; and slow review processes that often fail to provide cost-effective resolution of complaints.

Given the original objectives of FOI, there is a need for clarification about the extent to which advice to government should be based on notions of confidentiality. While some confidentiality about some advice in some circumstances may be appropriate, blanket claims seem counter to the objective of informing public debate, and accountability for government decisions.

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## **CHAPTER 6**

### **FREEDOM OF INFORMATION**

#### **6.1. Background**

Freedom of information laws are the statutory acknowledgment of the public right to know. They are a well-established element in the framework of government in all federal, state and territory jurisdictions.

Freedom of Information (FOI) Acts<sup>1</sup> give effect to the philosophy of open and accountable government. The purpose of the laws is to extend as far as possible rights of access to documents held by a government agency, subject only to such exemptions as are necessary to protect important government, personal, and business interests.

FOI Acts typically require publication of documents used by an agency in the making of decisions that affect members of the public, and other information about agency functions; provide a legally enforceable right of access to documents held by ministers and agencies; and confer a right to amend information relating to the applicant in certain circumstances. Although based on a common framework, legislation varies across Australia.

The Acts try to balance the public right to information and the restrictions on access necessary for the proper administration of government. The primary objective of FOI is to help hold governments to account and to facilitate public participation in government decision-making.

Since the federal Act started in 1982, followed by state and territory legislation, there have been almost a million FOI applications—766,000 to Federal Government agencies alone between December 1982 and June 2006. What has been released over the years in response to requests is largely known only to the FOI applicants involved, unless they put information about it into the public domain or external review processes have this effect. No exhaustive research has been undertaken on the overall performance of FOI legislation in Australia.

This audit has reviewed literature and published reports of inquiries on the operation of FOI in Australia, and surveyed journalists and other commentators who have experience in using the Acts to seek access to government documents.

#### **6.2. FOI and the media**

The media play an important role in scrutinising government and bringing to public attention information about the conduct of public functions. FOI should play a part in seeking access to government information, particularly in investigative journalism.

Several research projects on the use of FOI by the media showed journalists did not use FOI extensively in its early years.<sup>2</sup> The explanation appears to be that excessive

delay, cost and a poor record of access to documents led many journalists to conclude that FOI, particularly in seeking access to documents held by federal government agencies, was not worth the effort.

However, there is evidence of increased use of FOI recently by the media, particularly in seeking access to documents held by state and local government authorities.<sup>3</sup> FOI-based reports are becoming an almost daily feature in the press. In August and September 2007, 70 media reports were based on documents released in response to FOI applications by journalists, or others including opposition members of parliament who made the released documents available.

### **Selected media reports based on FOI documents September 2007**

*The Sydney Morning Herald* “Secret plan to divert funds from the ‘affluent’” 28 September 2007 – government under-funding of Royal North Shore Hospital

*The Advertiser* “Mill wanted special deal” 27 September 2007 – development proposal for pulp mill inadequate

*Herald Sun* “Weapons vanish from ADF stores” 25 September 2007

ABC News “NSW Govt stands by pulp log price” 24 September 2007 – pulp wood prices disclosed

*Mercury* “Asbestos rife in Tassie schools” 24 September 2007

*The Daily Telegraph* “Stations deserted for cost-cuts” 24 September 2007

ABC News “Uni spends on parties while cutting staff: Greens” 20 September 2007 – Victoria University spending

ABC News “Cash-strapped hospitals cancelling surgery: Opposition” 19 September 2007 – fewer operations in NSW public hospitals

*The Age* “Bracks’ water ads broke budget” 19 September 2007

*Herald Sun* “Judge’s \$50,000 trip bills” 18 September 2007

*Herald Sun* “Trauma as ambulances, patients queue up” 17 September 2007

*The Sydney Morning Herald* “Idle desalination plant to cost \$50m a year” 17 September 2007

*The Australian* “States shifting health costs to Canberra” 10 September 2007

*The Daily Telegraph* “A nation of dobbers; tax hotline melts” 10 September 2007

*The Age* “Export dealers claim AQIS vets untrained” 6 September 2007

*The Daily Telegraph* “Luxury Carr is saving a bob - \$30,000 off bill” 3 September 2007 – expenditure by former premiers

*The Daily Telegraph* “Explosion in schoolgirl weapons and violence – SPECIAL REPORT” 3 September 2007 – reports of violence in public schools

*The Daily Telegraph* “State turns it up on noise polluters – EXCLUSIVE” 3 September 2007

*The Advertiser* “GPs not to blame for hospital chaos” 1 September 2007

Journalists contrasted their experience in the federal and state arenas:

*The NSW Act works a lot better than the Commonwealth Act. With some notable exceptions, NSW departments tend to be more inclined to release information and less inclined to construct legalistic arguments to exempt release of material than do their Commonwealth counterparts. They also tend to charge less and work a lot faster.... That said, there are plenty of problems with the operation of the NSW Act and the way it is administered.*<sup>4</sup>

Journalists from other states expressed similar sentiments.

### **Case study: federal and state responses to a request for access to research material**

Associate Professor Anne Twomey of the University of Sydney School of Law carried out research on the Australia Acts 1986. The Acts were passed by all Australian parliaments to sever residual links with the United Kingdom. Professor Twomey sought special access (under the *Archives Act*) to British and Australian government documents about policy development that preceded the introduction of legislation:

“State governments have proved most helpful,” she reported. “Small amounts of consultation were required in some cases. In New South Wales, the government sought the approval of the premier of the day, Neville Wran, who gave it willingly. In Western Australia, the Labor and Liberal attorneys-general of the day were consulted, and both agreed to provide access. In Tasmania, the Solicitor-General was consulted and approved. In Queensland, it was a little more difficult, partly because most of the files could not be found. Eventually, when relevant documents were identified, an opinion of the Attorney-General was sought in order to waive privilege over legal opinions. In the end, the waiver was given and the documents released.

“The British Government was also extremely helpful. It gave full access to over 60 files ranging from 1974 to 1986 concerning the constitutional relationship between the states and the United Kingdom..... (T)here was no vetting or exclusion of documents. Legal opinions, Cabinet documents and even documents that might prove embarrassing were made available within a couple of months of the request.

“The Commonwealth was a completely different story. After a bureaucratic process of meetings, submissions, reports, consultations, vettings, demands for ASIO security clearances, and scandalous delays lasting almost three years, only a small proportion of the Commonwealth’s documents, described by officials as ‘the innocuous ones’, were released by the Commonwealth Attorney-General’s Department. The Prime Minister’s own department still has not managed to release a document after three years. Access to legal opinions was also formally denied by the Attorney-General’s Department, despite the fact that they were more than 20 years old. In contrast, the states, the United Kingdom and the Special Committee of Solicitors-General released their legal opinions.”

*Anne Twomey is the author of The Chameleon Crown: The Queen and Her Australian Governors (Federation Press, November 2006) which exposes the relationship between the Australian states, the Crown and the United Kingdom. The above extract is from an article in Quadrant January 2007, Vol LI, No 1-2.*

### **6.3. Does FOI work?**

The evidence indicates that FOI laws work, to a degree, but not consistently and not always well. FOI works best when applicants seek access to their personal information held by a government agency. The statistics at federal and state level indicate that most applications are for documents of this kind and that a high percentage result in access to the documents sought.

The annual report on the operation of the federal *FOI Act* 2005-2006 says 85 per cent of the more than 40,000 requests received during the previous year were for documents containing personal information of the applicant. The high level of access provided in response to these applications was the basis for the observation by the federal Attorney-General, Philip Ruddock, that 94 per cent of all requests for information had been granted in full or in part. Although the figures vary, the state and territory government experience has been similar. On the basis of statistics regarding agency performance, Mr Ruddock said the federal *FOI Act* was achieving its intended purpose.<sup>5</sup>

Success in access to personal information about the applicant is not an appropriate test of success of FOI. The rationale of the legislation is to improve accountability, and facilitate public participation in government decision-making. The mistaken view that FOI primarily is a means of access to an applicant’s personal information is evident at high levels of government despite guidance for officials about its broader objectives.

### **Rationale of *FOI Act* in Federal Government guidelines**

The underlying rationale behind the *FOI Act* is open and accountable government. Its object is to extend as far as possible the right of the Australian community to access to information in the possession of the Commonwealth (s 3).

Broadly, the aims of the legislation are to:

- enable people to participate in the policy and decision-making processes of government;
- inform people of government functions and enable them to access decisions that affect them;
- open government activities to scrutiny, discussion, review and criticism;
- enhance the democratic accountability of the Executive;
- provide access to information collected and created by public officials.<sup>6</sup>

Information of low sensitivity is usually released under FOI, particularly documents clearly not covered by exemption provisions. Government policy is that access should not be refused where material is not contentious. Despite this direction, there is evidence of some instances where an agency has chosen to resist disclosure, and seek to protect from disclosure some information already in the public domain.

### **Federal Treasurer Peter Costello on the rationale for FOI**

The Freedom of Information laws as originally conceived were particularly to allow citizens to know what the Government knew about them and that is their use and to allow citizens to correct information that the Government has wrongly held about them. I would not want to see practices growing up under those laws which would inhibit policy making or would lead to disinclination in relation to working documents and policy development to document in writing the pros and cons of particular proposals.<sup>7</sup>

**Federal Court of Australia finds a list of licensed post offices exempt from disclosure.**

An FOI applicant sought access to information concerning franchises by Australia Post to conduct licensed post offices. The application was refused, but the Administrative Appeals Tribunal varied the decision. Access was granted to the name of the licensed post office, street address, suburb, state and postcode. The names of the franchisees were found to be exempt. Australia Post appealed against the decision to the Federal Court. The court allowed the appeal on the basis of evidence that the list contained information in relation to Australia Post's commercial activities, information exempt under section 7 (2) of the Commonwealth *FOI Act*.<sup>8</sup>

Although Australia Post may have felt an important principle was involved, as the tribunal noted, the list of licensed post offices and addresses is publicly available in the White Pages.

Most state and territory governments also stipulate that access should be granted to non-sensitive information.

Applications for documents concerning policy development and research, government decisions and information concerning the conduct of public functions raise more complex issues. Refusal rates are predictably higher than for requests for access to personal information. In 2005-2006 11 per cent of applications to Federal Government agencies for "other" documents were refused entirely and in another 35 per cent of applications the applicant received only some (unspecified) part of the relevant documents requested.<sup>10</sup>

Decisions to refuse access to documents about some aspects of government operations may be soundly based on exemptions in the Act designed to protect national security, investigations, and sensitive information about high-level economic, financial and other national interests. Information about other individuals and commercial interests should also be protected in certain circumstances. The obligation of a government agency in refusing access to these types of documents is to fully explain the reasons for the decision and justify the decision based on specific provisions of the legislation.

**Government direction (2005) not to refuse non-contentious material.**

In 1985 the Government issued directions that agencies should not refuse access to non-contentious material only because there are technical grounds of exemption available under the *FOI Act*. These directions remain applicable. Proper compliance with the spirit of the FOI Act requires that an agency first determine whether release of a document would have harmful consequences before considering whether a claim for exemption might be made out.<sup>9</sup>

Submissions from users, however, suggest that they encounter routine resistance to documents that seem likely to contain sensitive or politically significant information.

As Dr Gareth Griffith of the NSW Parliamentary Library commented in the NSW context:

*What is clear from the case law is that attempts to gain access to more sensitive or contentious information held by government agencies are vigorously contested.*<sup>11</sup>

## **Mixed Results**

Media reports in the weeks prior to the finalisation of the audit's report illustrate the mixed results from FOI applications.

FOI works:

ABC television news reported that documents released by Gosford City Council showed the Council knew three years before about repairs needed to a stretch of the Pacific Highway that collapsed in June this year, killing a family of five (Sydney Morning Herald "Hollow road held few surprises for those who drove it often" 17 October 2007).

FOI also led to disclosures, among others, of information about speed camera tickets issued to Queensland Police officers (The Courier Mail "Police in rush for fines" 16 October 2007); instances of staff bullying, violence and sexual harassment over the last three years at Sydney's Royal North Shore Hospital (The Daily Telegraph "Staff quitting after bullying" 13 October 2007); and the payment of \$6 million bonus to the private operator of Victoria's speed cameras based on successful prosecutions (Sunday Herald Sun "Speed bonanza: Camera bonuses cost public \$6M" 28 October 2007).

On the other hand:

The Federal Treasury refused access to all but 16 pages of a 2004 report by officials on criminal sanctions for hard-core-cartel conduct. The issue is of strong current interest, given heavy fines of \$38 million recently imposed on the prominent businessman Richard Pratt, the Visy Corporation and others for collusion to fix prices of cardboard boxes between 2000 and 2004. The FOI matter is now before the Administrative Appeals Tribunal. The Secretary of the Treasury is considering whether to issue a conclusive certificate in respect of the report (Australian Financial Review "Costello working hard to avoid action of cartels" 26 October 2007).

The Great Barrier Reef Marine Park Authority responded to a request for documents concerning the effect of global warming on the reef, with an estimate of costs of \$12,718, including "538.95 hours" for the time involved in making a decision on the status of the documents. The Authority said that an additional 30 days will be required to make a decision in addition to the normal 30 day time limit. The Authority has indicated that no public interest rebate on fees is available as "it appears likely the documents have been sought by the applicant to assist with his political campaign in

the lead up to the impending Federal election” and might be selectively released by him to the public. (ABC News “Reef authority rejects FOI suppression claims” 25 October 2007; The Australian “Garrett request hits great barrier” 26 October 2007)

The Australian National Gallery attempted to dissuade an applicant from proceeding with an application for a list of its 20 most valued works, and refused to reveal the value of individual works on the basis that disclosure would increase the risk of theft, despite the fact that it is common practice for prices to be disclosed when major works of art are bought and sold (The Australian “Censorship over gallery art works” 27 October 2007).

The Victorian Department of Premier and Cabinet refused to release a report reviewing the performance of the Government’s overseas business offices (The Age, “Brumby’s door yet to open” 29 October 2007)

The Queensland Department of Local Government refused access to submissions received regarding forced council amalgamations on grounds that all 47,267 submissions had been taken to cabinet (Sunday Mail “FOI block on merger data” 7 October 2007). For the same reason access was refused to documents concerning the feasibility or viability of a light metals project that received \$300 million in state and federal government support. The company involved, Australian Magnesium Corporation, collapsed in 2003 (The Courier Mail “Bligh will keep lid on AMC meltdown” 3 October 2007)

#### **6.4. Reviews of FOI**

There have been many reviews of FOI at federal, state and territory levels since the various Acts started.<sup>12</sup> Some have resulted in amendments to the legislation and changes in administrative processes. In the case of the federal Act, a comprehensive review (Open Government) was undertaken by the Australian Law Reform Commission and the Government’s advisory body on administrative law and related matters, the Administrative Review Council, in 1995.<sup>13</sup>

The Open Government Report was based on two years of research, public consultation and analysis of the operation of the federal Act over the previous 13 years. The report made 106 recommendations for changes to the Act, and for other steps to improve FOI performance.

The report found these among the more important deficiencies in the FOI system:

- There is no person or organisation responsible for overseeing the administration of the Act.
- The culture of some agencies is not as supportive of the philosophy of open government and FOI as the review considers it should be.
- The conflict between the old “secrecy regime” and the new culture of openness represented by the *FOI Act* has not been resolved.
- FOI requests can develop into legalistic, adversarial contests.
- The cost of using the Act can be prohibitive for some.
- The Act can be confusing for applicants and difficult to use.



- The exemption provisions are unclear, open to misuse by agencies and, because of their prominence, tend to overwhelm the purpose of the Act.
- Records management, which is fundamental to the effectiveness of the *FOI Act*, is not given sufficient prominence.
- Current review mechanisms could be improved.
- There are uncertainties about the application of the Act as government agencies are corporatised.
- The interactions between the *FOI Act* and the *Privacy Act*, and the potential conflicts they give rise to, have not been adequately addressed.<sup>14</sup>

Rick Snell comments that the report's recommendations were for changes that would bring the federal *FOI Act* into line with better practice approaches reflected in state legislation passed in the late 1980s and early 1990s:

*(I)n the main the ALRC/ARC proposals were a few, albeit important evolutionary steps but nothing revolutionary. One of the great mysteries of the 1990s is how such a modest reform agenda disappeared totally from any active consideration by the Commonwealth.*<sup>15</sup>

The Federal Government, in office since 1996, has not responded to the report despite the fact that Liberal Party policy before the 1996 election was to adopt "appropriate and workable" recommendations contained in the report.<sup>16</sup>

Most recently FOI was subject to review in 2006 by the Commonwealth Ombudsman<sup>17</sup> and the Victorian Ombudsman.<sup>18</sup>

The Commonwealth Ombudsman, Professor John McMillan, after examining practices in 22 agencies, concluded there was a clear commitment to, and a high degree of compliance with the spirit and detailed requirements of the Act in some agencies. However, he also found widespread problems in FOI decision-making and the probable misuse of exemption provisions. Particular problems were excessive delays in processing requests, delays and inconsistencies in charges, and variable quality in the standard of decisions and letters of explanation of those decisions.

The Ombudsman pointed to a failure by the heads of many government agencies to provide leadership on FOI. He urged the Government to act on reform first proposed in Open Government 11 years ago to create a position of Information Commissioner to monitor performance, provide guidance on interpretation of the Act, and ensure greater consistency in FOI across all federal agencies.

In a subsequent speech, Professor McMillan again referred to the patchy nature of federal agency FOI performance and said that any deviation from high standards reflected badly on the integrity of FOI management overall:

*A person's enjoyment of the rights conferred by the FOI Act should not depend on the agency to which their FOI request is made. There should be a uniform commitment to FOI objectives across government—a whole-of-government standard, as it were. We expect all agencies to perform at a uniform standard in administering financial integrity laws, and we can equally expect consistency in the administration of democratic integrity laws.*<sup>19</sup>

The Victorian Ombudsman, Mr George Brouwer, after examining FOI processes in 10 Victorian government agencies and Victoria Police, highlighted poor compliance with deadlines for processing requests, political involvement in some decisions, and questionable use of exemption provisions.

The Ombudsman more recently has said that complaints about FOI had fallen by 4 per cent in the previous 12 months but still expressed concern about a range of matters including delays, and lost files. The Ombudsman said:

*In several cases investigated, the reasons given for claiming exemptions were clearly misleading.... Some decisions showed little regard for the objectives of the FOI Act. The responses provided material that might technically be relevant to the request, but was of little or no benefit to the applicant. Some agencies took advantage of every available exemption to provide as little material as possible.*<sup>20</sup>

Reports in other jurisdictions have also highlighted major problems concerning the operation of FOI. The NSW Ombudsman in various annual reports has listed areas of concern and has called for comprehensive review of the Act over the past decade. The Ombudsman has drawn attention to a continuing trend of increasing refusals of access to documents, a trend discernible for the previous nine years during which the office had surveyed government agency performance. The Ombudsman said NSW had the highest rate of refusal of access to all or some of the documents requested. He also highlighted complaints about charges, and inappropriate use of exemption clauses.<sup>21</sup>

Although the NSW Government has not responded to calls for comprehensive review, the Attorney-General in 2006 referred to the NSW Law Reform Commission an issue concerning the access provisions of the *FOI Act* and their relationship with other laws concerning privacy and access to local government records.

## **6.5. Barriers to access to information under FOI**

While there are some differences between the various Acts and administrative practices, some common themes emerge from reports, reviews and the experience of FOI users.<sup>22</sup> The following is a summary of the main issues identified as barriers to effective use of FOI.

- A continuing culture of secrecy is evident in some areas of government. It affects FOI administration. FOI is not the subject of consistent advocacy, leadership and support.
- Political intervention, or the significance that may be attached to political considerations in the course of decision-making, gives rise to a perception that in some cases these factors outweigh the public interest in disclosure.
- The laws in most instances do not require a pro-disclosure bias in making decisions on access. Often technical legal considerations override the objectives and the spirit and intention of legislation.

- The scope of FOI is limited. Some agencies or particular functions of agencies are excluded from the operation of FOI Acts. Privatisation and contracting out have also resulted in documents previously accessible about the conduct of public functions being placed outside the scope of FOI.
- The impact of other legislation on FOI, including privacy laws and laws containing secrecy provisions, can lead to confusion, and in some cases limit access.
- Poor recordkeeping practices affect the effectiveness of FOI. There is evidence that important information about aspects of government operations is not systematically recorded.
- Exemptions are subject to a wide range of interpretations, particularly where public interest considerations in favour of disclosure or non-disclosure of documents need to be weighed and balanced.
- Powers to issue conclusive or ministerial certificates to deny access, and the fact that such certificates are subject to limited rights of review, can operate as an unreasonable constraint on access.
- Delay in responding to requests and slow processes for review of determinations means that requests for documents can take months, sometimes years to resolve.
- Cost is a barrier to access. Criteria for reduction of costs are difficult to satisfy. Tribunal or court processes are expensive. Grounds on which cost orders are available to applicants who succeed on external review are limited to tightly defined special circumstances.

#### **6.5.1. Continuing culture of secrecy**

The 1995 Open Government Report noted that the culture in some agencies was not supportive of the philosophy of open government and that the conflict between the old secrecy regime and the new culture of openness represented by the *FOI Act* had not been resolved.

In 1999 and again in 2006 the Ombudsman also identified culture as a major concern.

In a 1999 report, after an investigation of FOI administration, the Ombudsman said:

*... the investigation also identified a more pervasive malaise in the administration of FOI: a growing culture of indifference or resentment towards the disclosure of information, ailing standards of training and development and a profound lack of understanding of or commitment to the ethos and purpose of the legislation. It appeared that, although the FOI Act had wrought some change in the culture of public administration, its goals had been imperfectly achieved. Many of the early FOI practitioners were advocates of open government, but had, over time, been replaced by staff who had grown up in a very different environment, with FOI just one of a number of competing demands on agency time and resources.*<sup>23</sup>

In 2006 Prof McMillan said some of the principles that underpinned the legislation “had been forgotten or not fully understood by those currently responsible for FOI management”.<sup>24</sup>

State Ombudsmen who have monitored compliance or deal with complaints also identify culture as an issue that has not been satisfactorily dealt with.

There are few visible signs of leadership and advocacy for open government principles within government. On the contrary, some comments by prominent officials do nothing to affirm the importance of FOI. For example the Secretary of the Treasury, Dr Ken Henry, has said that as a result of FOI requests which he judged were “motivated by a desire to either embarrass the Government and Treasurer or the Department”, communication on sensitive policy issues is likely to be verbal rather than committed to paper.<sup>25</sup>

These observations about the dangers of FOI send a message to officers across the public service about how FOI gets in the way of what might be regarded as proper public administration.

Public, consistent, strong support for open government principles is equally difficult to find among ministers in any jurisdiction. Prof McMillan, before his appointment as Ombudsman, commented that a “recurring theme in the history of FOI laws around Australia is that governments gradually lose their initial enthusiasm for FOI”.<sup>26</sup>

### **6.5.2. Political influence on decision-making**

Australia’s FOI Acts contain varying provisions about responsibility for decisions. The federal and Victorian Acts provide for applications for agency and ministers’ documents and include scope for the minister, or a designated person in the minister’s office, to make a determination on any application.

Other Acts make a distinction between applications received by a minister and applications for agency documents. In the case of the former, a decision on access is for the minister or a staff member in the minister’s office. In the case of an application for agency documents, the decision on access is to be made by a designated officer of the agency.

Little information is publicly available about the extent to which ministers, or members of their office staff acting under ministerial authority, formally make decisions on FOI applications. However, decisions on access by a minister or a member of the minister’s staff on a matter in which they had been directly involved may give rise to a perception that political considerations may have influenced a decision to refuse access to documents.

## **Resignation of former Minister for Ageing**

An application to the Department of Prime Minister and Cabinet in 2007 for documents about the share dealings of the former minister for ageing, Santo Santoro, was allocated to a ministerial adviser in the Office of the Prime Minister. The decision was to refuse access to all documents—including a letter from the then minister to the Prime Minister’s Chief of Staff—on the grounds that information had been provided on a confidential basis; was information that would reveal consultation or deliberation in the course of the deliberative processes of government and was contrary to the public interest; and that disclosure of personal information about Mr Santoro would be unreasonable.

The notice to the applicant said the decision was taken to have been made by the Prime Minister. As a result there was no right for internal review. The applicant was advised that an informal review process was available should he wish to pursue the matter. Rights of external review to the Administrative Appeals Tribunal also exist.<sup>27</sup> The Prime Minister had, before the decision on access to documents, dealt with the resignation of Senator Santoro as Minister for Ageing after public disclosure of some information concerning his shareholdings.

There is also potential for political considerations to be seen to bear on public service decision-making on access under FOI. This may arise either through direct influence of a minister or a member of staff on a public service decision-maker, or because of a perceived obligation by the public servant involved to protect the minister from any political or other consequences that might flow from disclosure.

Ministers’ offices are regularly briefed on FOI applications received by an agency for which they are responsible. This alerts ministers to applications received, for example, from Opposition members of parliament, interest groups and the media. A June 2003 Defence Department minute<sup>28</sup> directs public servants that a submission “is required to be provided to the minister” for a “sensitive” FOI application. This audit has seen a regular report to the federal Treasurer on FOI applications awaiting determination by the department in NSW. As well as ministerial briefings, agencies have to report to the Department of Premier and Cabinet every two weeks on FOI applications.

In some cases, particularly in state government agencies, the officer responsible for FOI matters is in a ministerial liaison unit, with day-to-day contact with the minister’s office.

## **Media adviser the contact for queries**

In response to an application by a journalist to the Department of Health and Ageing, documents were released with an accompanying letter advising the applicant that the minister’s media adviser was the appropriate contact for any queries relating to the matter.

While there is nothing untoward in ministers being made aware of FOI matters on hand, this practice raises the potential for attempts to influence decisions on access.

The Commonwealth Ombudsman has commented that complaints to his office concerning applications for access to non-personal documents typically raise concern about the involvement of ministers and their staff in dealing with a particular application. The annual report provides no information about the outcome of any investigation of these complaints.<sup>29</sup> This may reflect the fact that the Ombudsman cannot investigate the conduct of government ministers.

In Victoria, the Department of Justice guidelines provide instructions on how the minister's office is to be briefed before disclosure of documents under the *FOI Act*. The Victorian Ombudsman's 2006 review includes several case studies which show there were directions issued by a minister, or on behalf of a minister, regarding the determination of an application. Some directions were acted on by the departmental officer concerned. Others were resisted.

At another level concern has been expressed about the extent to which the public service responsiveness to the needs of the minister and the government of the day may adversely influence public servants in carrying out duties.

Former federal Health Department Secretary and Public Service Commissioner Andrew Podger, who retired after 37 years with the public service and is now the president of the Institute of Public Administration Australia has called for a national public inquiry into government administration across all jurisdictions to try to increase impartiality of the public service amid creeping politicisation. Podger said the inquiry should "report on how best to ensure both responsiveness to elected governments and ongoing protection of the public interest through impartial and professional public administration in a world that has changed from the more simple Westminster model of our textbooks".<sup>30</sup>

Podger has also said, reflecting on his own experience in government, that the fear that disclosure of documents might be politically difficult led him to conclude that partisan interests are often the main consideration in frustrating FOI requests, with little regard for the public interest.<sup>31</sup>

The Secretary of the Department of Prime Minister and Cabinet, Dr Peter Shergold, maintains that while ministers have the right to determine the public interest in strategic policy decisions, public servants are and must remain in a position to make independent decisions without ministerial interference or direction on other issues:

*Ministers cannot change the outcome of a tender process which has been delegated to a public servant, or use public funds in ways for which they have not been appropriated, or ask to see the advice that their departments have provided to a previous government, or tell a public servant how to respond to an FOI application [emphasis added], or—without the agreement of the Opposition—commit a future government during an election caretaker period, or decide on which senior executives are appointed to their departments. In these, and many other ways, power is balanced between the Australian government and its public administration so that, on occasion, the only possible response will be "No, Minister".*<sup>32</sup>

While Dr Shergold may have the standing and authority to resist indications of the preferences of ministers and ministerial advisers regarding access to documents, doubts remain that others in federal or other government authorities are in a position to resist strong views passed by, or on behalf of, ministers.

A decision refusing access to documents under FOI is the exercise of a statutory discretion. This requires judgment in good faith, based on all relevant but no irrelevant considerations, whether a document should be claimed to be exempt. Decisions on access should be free of political and other considerations not specified in the legislation. As Snell comments:

*“Public interest considerations as opposed to more narrow political and bureaucratic interests should be the key determinants in the decision making process”.*<sup>33</sup>

### **6.5.3. Pro-disclosure bias**

A major problem identified in the Open Government report in 1995 was the absence of a strong, clear statement of legislative intent that the *FOI Act* should be interpreted and applied in favour of disclosure. As interpreted in courts<sup>34</sup> and tribunals, the Act's exemption provisions are given equal weight. The report recommended a clear statement and the deletion from the objects clause of any reference to the exemption provisions:

*The object clause of the FOI Act (s 3) should be amended to explain that the purpose of the Act is to provide a right of access which will*

- *enable people to participate in the policy, accountability and decision-making processes of government*
- *open the government's activities to scrutiny, discussion, comment and review*
- *increase the accountability of the Executive*

*and that Parliament's intention in providing that right is to underpin Australia's constitutionally guaranteed representative democracy.*<sup>35</sup>

There are similar issues about interpretation of the Act in most states and territories. Even in those states where the objects of the Act to promote disclosure are clear, administrators and in some cases review bodies have been reluctant to interpret and apply the Act in a way that leans towards disclosure. For example despite the fact that the NSW Court of Appeal<sup>36</sup> has stated that the Act should be interpreted and applied with a general attitude favourable to the provision of access, this is not reflected in decisions by the NSW Administrative Decisions Tribunal which adopts the approach that there should be no “leaning” in favour of disclosure in the interpretation of exemption provisions.<sup>37</sup>

## 6.6. Scope of legislation

FOI legislation at the federal, state and territory levels applies to documents held by a government agency.

All Acts exclude some government agencies entirely from the operation of the legislation; others are excluded in respect of some of their functions.

For example the federal and all state and territory parliaments and parliamentary departments are outside the scope of FOI. As a result documents concerning overseas travel by members of parliament and some expenditure of public money by and on behalf of members of parliament is not subject to FOI legislation.

The federal Act provides blanket exemptions for Aboriginal Land Councils and Land Trusts, the Auditor General, the Australian Industry Development Corporation and Australia's intelligence organisations. Another 25 federal organisations are exempt in respect of some functions, usually those associated with commercial activities.

Twenty-five years after the federal *FOI Act* started uncertainty remains about what functions of some government bodies are excluded from the Act. The Australian Broadcasting Corporation was successful in the Federal Court in arguing that the exclusion in the Act for documents in relation to program materials was broad enough to cover documents concerning complaints about ABC coverage of events in the Middle East in 2000-2002. The court decided the exclusion covered any document that had a direct or indirect relationship to program materials.<sup>38</sup>

The decision to interpret these words broadly has implications for the breadth of the exclusions that apply to other Federal Government bodies listed in the *FOI Act*. The decision has been criticised as inconsistent with the legislative history of the exemptions, which suggests that the intention was intended to cover program materials that had commercial value. As Fraser comments, the interpretation of the provision, "could not on any legitimate construction include the complaints material" the subject of this application.<sup>39</sup>

In Queensland the Queensland Events Corporation and a number of similar bodies are exempt from the operation of the Act.

In NSW 25 government agencies are exempt from the operation of the Act in respect of some functions, including complaint handling and investigative functions. The case for blanket exemption, for example for documents concerning the complaint handling functions of the Department of Local Government, even where the investigation of a complaint has been completed, appears to be unnecessarily broad in putting certain types of documents outside the scope of the legislation.

Many former government bodies have been privatised, and the functions of other government organisations have been contracted out since the start of the relevant FOI Act. At the federal level, the Administrative Review Council conducted an inquiry into administrative law issues arising from contracting out, and reported to the Government in 1998. The council's report recommended that the Act be amended to provide a right of continuing access under FOI to documents held by a non-



government organisation conducting public functions on behalf of a government agency.<sup>40</sup> The Government has not introduced legislation to achieve this purpose. State governments do not appear to have addressed this issue.

### **6.6.1. Relationship with privacy and secrecy laws**

The relationship between FOI Acts and provisions of other Acts can give rise to confusion and uncertainty about rights of access to information and the interpretation of exemption provisions.

The Open Government Report highlighted difficulties arising from the access provisions in privacy legislation, and similar rights contained in the *FOI Act*. While the Federal Government has sought to reduce complexity by amending the *FOI Act* to refer to “personal information”—the term used in the *Privacy Act*—in other jurisdictions (for example NSW and Victoria) different terms are used in each Act. Further recommendations on reducing overlap between FOI and the *Privacy Act* are contained in the Australian Law Reform Discussion Paper 72 on Review of Australian Privacy Law, released in September 2007.

In NSW confusion about access rights under FOI and a range of other legislation, described by the Ombudsman as a “maze”, was one reason cited by the Government for referring the issue of access to information rights to the NSW Law Reform Commission for review.<sup>41</sup>

The interrelationship between FOI Acts and other legislation that requires information to be kept secret also gives rise to problems of interpretation. Chapter 5 includes details of more than 335 Acts that contain secrecy provisions.

Moir Paterson comments that secrecy provisions in other laws limit the provision of informal access to documents outside FOI, and may operate to exempt material which fails to qualify for exemption on other grounds. In some cases government has undertaken a review of secrecy provisions in other Acts and has tried to simplify the relationship between these Acts and FOI by including a provision that limits the secrecy exemption to specified Acts in the *FOI Act*.

Paterson acknowledges that the federal *FOI Act* includes guidance of this kind:

*(H)owever, it is important not to ignore the chilling effect of the large number of other existing secrecy laws, including the category of general secrecy provisions which prohibit the disclosure of information acquired by government officers in the course of their duties. General secrecy provisions have a very wide interpretation and effectively prohibit the revelation, whether deliberate or accidental, oral or in writing, of anything that is secret. Liability does not depend on the nature or sensitivity of the information in question and reflects an outdated view that the general public has no legitimate concern about the processes of government.*<sup>42</sup>

Elsewhere the failure of government to examine other laws that prohibit disclosure of information, and how these laws affect FOI, continues to be a major problem in access to information. The NSW Government in 1988 made a commitment to review secrecy provisions in other Acts to ascertain whether in the light of the introduction of FOI, it was appropriate to remove them.

The Appeal Panel of the NSW Administrative Decisions Tribunal commented earlier this year:

*The Premier of that time failed to implement the promise, and no action has been taken since.... We repeat the concern previously expressed that active reliance by agencies on secrecy provisions in their statutes could mean that the FOI Act will cease to have any application to many parts of the New South Wales public service, thus undermining the very purpose of that legislation. Secrecy provisions are a commonplace of agency statutes in New South Wales. The result is an unsatisfactory one.*<sup>43</sup>

Tell me about two-up in Broken Hill- no, yes, maybe....

***The Gambling (Two-Up) Act 1998 includes provisions that legalise two-up in Broken Hill when conducted by on or on behalf of the local council. Part 3 of the Act sets out conditions that apply to the council in authorising the conduct of games. The Act includes a secrecy provision, relating to disclosure of information, which qualifies the provision by permitting disclosure in some circumstances, and gives limited authorisation to disclosure of information under the Freedom of Information Act.***

#### Section 29 Secrecy

- (1) A person who acquires information in the exercise of functions under Part 3 must not, directly or indirectly, make a record of the information or divulge the information to another person, except in the exercise of functions under Part 3. Maximum penalty: 50 penalty units.
- (2) Despite subsection (1), information may be divulged:
  - (a) to a particular person or persons, if the Minister certifies that it is necessary in the public interest that the information be divulged to the person or persons, or
  - (b) to a person, or an authority, prescribed by the regulations, or
  - (c) to a person who is expressly or impliedly authorised to obtain it by the person to whom the information relates.
- (3) It is not an offence under this section if, in any legal proceedings, a person divulges the information:
  - (a) in answer to a question that the person is compellable to answer, or
  - (b) by providing a document or other thing that the person is compellable to produce.

- (4) An authority or person to whom information is divulged under this section, and a person or employee under the control of that authority or person, are, in respect of that information, subject to the same rights, privileges and duties under this section as they would be if that authority, person or employee were a person exercising functions under Part 3 and had acquired the information in the exercise of those functions.
- (5) This section does not apply to the divulging of information to, or the production of any document or other thing to, any of the following:
  - (a) the Independent Commission Against Corruption,
  - (b) the Australian Crime Commission,
  - (c) the New South Wales Crime Commission,
  - (d) the Ombudsman,
  - (e) any other person or body prescribed by the regulations for the purposes of this subsection.
- (6) This section does not prevent a person being given access to a document in accordance with the *Freedom of Information Act* 1989, unless the document:
  - (a) contains matter the disclosure of which could reasonably be expected to do any of the following:
    - (i) prejudice the investigation of any contravention or possible contravention of the law (including any revenue law) whether generally or in a particular case,
    - (ii) enable the existence or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be ascertained,
    - (iii) prejudice the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law (including any revenue law), or
  - (b) is a document the disclosure of which would disclose any of the following information:
    - (i) information concerning the business, commercial, professional or financial affairs of the Council in relation to the conduct of games of two-up, a key employee or a person conducting games of two-up on behalf of the Council,
    - (ii) information obtained in the course of an investigation of a key employee or any such person.
- (7) In this section, a reference to the divulging of information includes a reference to the production of a document or other thing and the provision of access to the document or other thing.

## 6.7. Recordkeeping

Rights of access under FOI laws primarily relate to access to documents held by an agency. The Acts define a document as a written document or electronic record. In most circumstances there is no obligation to create a document in response to an application.

FOI laws can only be effective where government recordkeeping practices ensure that important aspects of government operations are recorded and maintained.

The Open Government Report in 1995 identified problems associated with recordkeeping practices. At that time, the commission noted there was “no statutory regulation of recordkeeping in the federal public sector, except in respect of archives. Nor are there comprehensive best-practice standards or guidelines. A consequence of this is that there is no uniformity in recordkeeping practices”.<sup>44</sup>

The commission commented:

*A fundamental aspect of recordkeeping is the creation of records that will adequately document the activities of the organisation. Failure to create such records reduces an organisation’s accountability. There is currently no general obligation on federal public servants to create adequate records. Nor is there a general requirement to document decisions.*<sup>45</sup>

Recordkeeping since 1995 has become more complex in the light of a vast increase in electronic records and the use of email. Guidelines and standards have now been issued but problems remain reflected in a series of Auditor-General reports<sup>46</sup> and in high-profile cases concerning the Department of Immigration.

In a report in October 2006, the Auditor-General drew attention to inadequacies in policy, procedures and the management of records, including digital records in several government agencies. One of the factors that contributed to inadequate recordkeeping “was the absence, to varying degrees, of adequate guidance to record users about the expected recordkeeping requirements in specific work areas. Where guidance material did exist, it was not always supported and reinforced by an ongoing program of training and awareness”.<sup>47</sup>

In August 2007, the Federal Government’s Management Advisory Committee (MAC), consisting of the heads of departments and chaired by the Secretary of the Department of the Prime Minister and Cabinet, Dr Peter Shergold, also released a report on recordkeeping practices.<sup>48</sup>

Dr Shergold emphasised the importance of good recordkeeping practices, but his comments suggest that basic issues concerning precisely what records need to be retained are still to be faced in some agencies:

*(I)t is important that we are able to distinguish between the records we need to maintain and trivia and duplication. This report makes it clear that not every record must be kept. If we think about our email traffic, we realise that much of the material we receive and send deals with matters of fleeting interest and minor importance that would in the past have been dealt with by phone calls or face-to-face conversation that did not warrant (or result in) a written record. We should not be cluttering our records with such material.*

*MAC's message must not be misinterpreted. There is no suggestion that MAC encourages public servants not to maintain written records because they are sensitive or potentially embarrassing to ourselves or government. Nor is MAC proposing that we seek out and destroy records that may in the future provide a clearer understanding of Australia's politics, history, society, culture and people. Rather the report states clearly that the preservation of such records must be one of our primary objectives. I don't want to suggest to the media, by any oral shorthand, that public servants seek furtively to kick over the traces, intending to hide from the present or the future the actions of governments or the officials who serve them.*

*It is vital that we retain the records that will enable us to meet our legal obligations, to be answerable and accountable and to provide business continuity. Records may be important because of their content. They may be significant because of the context they provide to decisions. They may be of value because no other copies exist. But we do need to exercise judgment. We need to decide whether, and for how long, a record is worth keeping. Just because a record has been created does not mean that it needs to be retained. Just because it has been managed does not mean it needs to be preserved.<sup>49</sup>*

The lack of prescription about what records should be created and maintained would appear to apply to government activities generally, including policy development processes.

The Secretary of the Treasury, Dr Ken Henry, has commented that FOI has resulted in advice not being recorded:

*Communication with the Treasurer is obviously vital. But, because of FOI, records are not always kept.<sup>50</sup>*

Podger has also spoken about practices to minimise the paper trail to avoid potential scrutiny under the FOI Act.

*The trail that is left is often now just a skeleton without any sign of the flesh and bones of the real process and even the skeleton is only visible to those with a need to know.<sup>51</sup>*

Yet the Australian Public Service Commission and the Australian National Audit Office have made it clear that records of important steps in the decision making process should be maintained. While they do not suggest that every meeting be recorded, or file notes prepared on every phone call, or that every email be retained:

*“On key issues, and where sufficient time is available, it is good practice for departments to use written briefings to provide assurance that the issues and options are clearly presented to the Minister and that any decisions taken by the Minister are understood and recorded.....in addition it is also good practice for departments to maintain an record of all briefings of significant issues and any resulting discussions and decisions. Briefings and records maintained need not be lengthy, but should be fit for their purpose”.*

Regarding the impact of the Freedom of Information Act on recordkeeping, the Commission states: “While the possibility of public access may properly influence how some communications are recorded, it is important to resist pressure to avoid making records where they would indeed clarify the decision – making process and accountability”<sup>52</sup>

While the situation regarding recordkeeping in state and territory organisations varies from one jurisdiction to another, the issue has been identified in state ombudsman and other reports as a matter of continuing concern.

In the absence of robust, disciplined, systematic practices for recording important aspects of the exercise of government functions, access to information laws such as FOI inevitably fall short of objectives to hold government to account for performance.

## **6.8. Exemptions**

The Acts contain many exemption provisions that raise complex questions of interpretation. While typical FOI Acts might contain 20 or so exemptions, the reality is that the exemption provisions usually include a range of variations that apply in particular circumstances.

The legal complexity is illustrated in the schedule of exemptions in the NSW *FOI Act* that appears at the end of this chapter. (See annexure A.) While the list includes 26 exemptions, the actual number is closer to 100 when the combination of different variations is taken into account. This level of complexity is similar in most respects to other Australian FOI Acts.

In an environment where decision-makers are encouraged to be cautious about disclosure, documents are examined word by word, line by line, and judgments made about whether all or any part of a document is exempt from disclosure. While high-level policy guidance may urge disclosure where possible, technical legal or quasi-legal issues may dominate decision-making.

In effect, if the starting point is to find an exemption provision to justify a decision to refuse access, close examination of the Act may identify possibilities that are worth even closer examination. As the then Opposition leader Bob Carr commented during the second reading debate on the NSW *FOI Bill* in December 1988, the legislation “will give a false impression of openness which will be dispelled through the bitter experience of applicants seeking to utilise the legislation...The Bill is littered with clauses and schedules that even the most inept bureaucrat will be able to use to secrete embarrassing material from public gaze”.<sup>53</sup>

During his 10 years as premier from 1996, Mr Carr did nothing to deal with the problem he had identified in 1988. Indeed, his government and its successor added new exemption provisions.<sup>54</sup> The NSW Government issued no updated guidance to government agencies regarding the interpretation of the *FOI Act* between 1994 and the publication of a manual by the Department of Premier and Cabinet in August 2007.

One of the problems with FOI may be too much law, and as a result, an overemphasis on legal considerations and the defence of decisions to refuse access. Lawyers clearly have a role to play in the interpretation of the law. This can be positive in some instances. For example the Audit has been made aware of the positive influence the Australian Government Solicitor's Office has had in some instances in convincing federal agencies not to persist with some untenable exemption claims. However the Deputy NSW Ombudsman has drawn attention to a tendency for agency lawyers to "deny and defend" decisions to refuse access:

"In my experience, lawyers generally see their role as defending their agencies. In the FOI context this often seems to involve finding reasons for justifying refusal of access, or defending agencies' decisions to refuse access. This of course normally translates in practice into an obsession with a literal approach to the interpretation of the FOI Act.

While I think it can reasonably be assumed that most lawyers can read, and that most lawyers who work in FOI have read the objects provision of the Act, in practice I seldom see any evidence that demonstrates this, or if so that they pay any attention to what they have read. The objects clause of the Act is a very special, if not almost unique provision – along with the stated objects of the Act it explicitly states the Parliament's intention as to how the Act is to be interpreted...

Just because something may not be technically illegal or a breach of the Act, does not mean it is 'right'. It is quite possible to do unreasonable, if not reprehensible, things that are quite legal. This is why I will often say to FOI practitioners and the senior staff of agencies – if you are going to use lawyers in the FOI area, make sure they are properly briefed to work within the spirit of the Act and to focus on resolving problems, not blindly denying and defending (particularly where our office becomes involved).

Lawyers often seem to see issues on the basis of 'win-lose', while senior bureaucrats seem more likely to be flexible in their approach, to be prepared to re-evaluate their approach and if necessary to compromise. Lawyers think 'deny and defend' makes a problem go away whereas senior bureaucrats generally recognise that in the longer term this will often have the opposite effect.

I think it is very unfortunate that experience in the FOI area is that the involvement of lawyers drags out the process, increases the resources required to deal with a matter, exacerbates a dispute, and certainly does not lead to us going away."<sup>55</sup>

The large number of exemptions and the various interpretations open to the decision-maker can constitute a barrier to access. Particular problems continue to arise regarding the balance between an individual's right to privacy and the public interest in disclosure of information, particularly about public officials, elected representatives and public figures; legal professional privilege; and documents concerning the operations of government agencies.

An overriding issue is that not all exemptions require consideration of the public interest in disclosure, although what constitutes the public interest and relevant public interest considerations in any particular case are also issues that complicate decision-making. None of the Acts prescribes as the essential test for withholding a document the simplest test —whether identifiable harm will result to an important public interest.

Use of some exemptions concerning Cabinet documents, business affairs documents and internal working documents were raised in submissions.

### **6.8.1. Cabinet documents**

Cabinet secrecy is an accepted element of responsible government in the Westminster system. However the Cabinet exemption in some FOI Acts is broad and goes beyond what might appear to be needed to protect the confidentiality of Cabinet deliberations. In Queensland, the exemption applies to any document submitted to Cabinet, giving rise to claims that large numbers of documents passed through the Cabinet meeting room to attract the exemption. Justice Davies in his report on Queensland public hospitals accepted evidence from a senior officer in the Department of Health about the practice:

*(G)overnments of both political persuasions in the period of his tenure from 1997 (initially the Borbidge Coalition Government and then the successive Beattie Labor Governments) abused the Cabinet process ... to avoid information deemed sensitive or politically embarrassing falling into the public arena. This was because s36 of the Freedom of Information Act 1992 provided for an exemption from Freedom of Information disclosure of documents which, in effect, were submitted to Cabinet.*<sup>56</sup>

The report included a number of adverse findings against former ministers for their involvement in these processes.

While the federal and some other Acts limit the Cabinet document exemption to documents prepared for the purpose of submission to Cabinet and other documents that would reveal aspects of the Cabinet process, exemptions in Victoria and Western Australia are also couched in broader terms.

There is no public interest test in the Cabinet document exemptions in the Acts. Paterson has commented that the absence of any public interest test or harm-based test “prevents an assessment of any violation to the democratic process sought to be



protected or maintained by FOI legislation”<sup>57</sup> In other jurisdictions, notably New Zealand, information about Cabinet discussions and decisions is publicly available after the event.

As Snell comments:

*A visit to the websites of New Zealand government agencies will reveal a plethora of Cabinet Papers, minutes and internal policy documents that have been released under the Official information Act.... The release of this type of material has often embarrassed the New Zealand government, posed difficulties in trying to persuade informed critics and limited the capacity to spin a policy development when the media has access to the full set of policy and briefing papers. Yet there has been little sign of the nightmare scenarios that have been painted by senior Australian civil servants ever since Senator Lionel Murphy tabled a proposal for a FOI Act at the first full Cabinet meeting in 1973.*<sup>58</sup>

### **6.8.2. Business affairs**

All Acts contain an exemption for sensitive commercial information to ensure that the business community is not unfairly prejudiced by exposure of competitive and other information held by a government agency.

Paterson comments that broad claims of “commercial in-confidence” and the absence of a clear requirement to weigh public interest considerations have had the consequence “that information will be exempt even where the likely harm to the information subject is of minimal nature...”<sup>59</sup>

### **6.8.3. Internal working documents**

All Acts include an exemption designed to protect the integrity of government decision-making processes. The exemption protects “thinking processes”, particularly advice and deliberation, where disclosure would be contrary to the public interest. There are wide variations in application of this public interest test.

FOI legislation is underpinned by the public interest in open and accountable government. “The public interest” is not defined in any of the Acts. In NSW (Section 59A) the Act specifies certain considerations that are not to be taken into account in determining where the public interest lies. These factors—that disclosure would cause embarrassment or loss of confidence in the government or an agency, or would lead the FOI applicant to misinterpret or misunderstand the information—are not seen to be controversial. Some argue their inclusion in legislation is redundant as case law indicates they are not relevant public interest grounds. Notwithstanding, the Open Government Report recommended that the federal *FOI Act* should include a similar provision to section 59A.

Reasons for decisions to refuse access to documents on public interest grounds do not appear to attach real weight to factors in favour of disclosure such as facilitating public debate on matters of significance to the community as a whole, or improving public understanding of government decision-making processes. While these factors

may be mentioned in some agency decisions, they appear to be readily discounted when compared to others that go in the direction of non-disclosure.

Many court and tribunal decisions have accepted as relevant some public interest considerations that provide broad grounds for claims of exemption for internal working documents. For example, in 1985 the President of the Administrative Appeals Tribunal, Justice Davies,<sup>60</sup> suggested a set of factors (Howard factors) said to be relevant to a determination that documents should not be disclosed on public interest grounds:

- a) The higher the office of the persons between whom communications pass, and the more sensitive the issues involved in the communication, the more likely it will be that the communication should not be disclosed;
- b) Disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest.
- c) Disclosure which will inhibit frankness and candour in future pre-decisional communications is likely to be contrary to the public interest;
- d) Disclosure which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest;
- e) Disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision-maker and may prejudice the integrity of the decision-making process.

Subsequent decisions by the federal Administrative Decisions Tribunal rejected most of these factors as irrelevant, except in special circumstances.<sup>61</sup>

The Queensland Information Commissioner in 1993 provided a detailed critique of the Howard factors<sup>62</sup> and current guidance in that state specifically excludes as relevant public interest factors “high office”, “candour and frankness”, “disclosure of confusing or misleading information”, and “not fairly disclose reasons for a decision”.<sup>63</sup>

In 2006 the NSW Court of Appeal said that while the Howard factors could not be discarded, evidence was required rather than reliance on “formulaic, theoretical” propositions developed in the pre-FOI closed government era. The court rejected views that the public interests identified in the Howard factors above as a, b, and e, justified non-disclosure of a document considered during the course of decision making. The court said that the objects of the *FOI Act* made it clear that the legislation “was intended to cast aside the era of closed government, and principles developed in that era may, with the benefit of 20 or more years of experience, be seen as anachronisms.”<sup>64</sup>

Surprisingly, some or all of the Howard factors, or variations of them, continue to be cited in responses by agencies in various jurisdictions in refusing access to documents on the grounds that disclosure would be contrary to the public interest. Some of the factors—including variations that might be described as the “son of Howard”—have

been given new life in decisions by review bodies, in particular the federal AAT and the Victorian Civil and Administrative Tribunal.<sup>65</sup> “Frankness and candour”, and a new formulation that disclosure would be contrary to the public interest because advice would not be committed to paper received some endorsement from two judges in the majority (Justices Callinan and Heydon) of the High Court in the McKinnon case.<sup>66</sup>

In a recent decision, the Deputy President of the AAT said there were well-established precedents that the effect on frankness and candour and on the creation of appropriate records were strong public interest considerations that favoured non-disclosure of advice documents.<sup>67</sup> The arguments accepted by the tribunal in this case appear to be “class” claims of a kind that would justify non-disclosure at any time up until 30 years had elapsed and the documents were available in open access under the *Archives Act*.

As indicated by the NSW Court of Appeal, broad claims of this nature appear inconsistent with the legislative intention to facilitate scrutiny of government.

There is an acknowledgement that government decision-making processes require some degree of confidentiality or “thinking space” before the making of decisions. Non-disclosure of thinking process documents before the making of a decision or the finalisation of deliberations is seen to be contrary to the public interest in most instances. However, Paterson says broad acceptance of factors of the kind set out in Howard inappropriately reduce transparency:

*Arguments based on candour and frankness are especially problematic because they encourage a culture which legitimates fear of public criticism, rather than one in which public servants are expected to have the necessary fortitude to give frank advice irrespective of any potential criticisms. To the extent that they are accepted, they encourage ministers and public servants to hide behind them as a means of preventing access to any information which might potentially expose them to criticism. Likewise, arguments based on the potential for documents to create confusion are arguably paternalistic and ignore the ability of agencies to provide any additional information required to provide further clarity to any documents disclosed.*<sup>68</sup>

**Former Chief Justice of the High Court of Australia the Hon. Sir Anthony Mason AC KBE, in an address to the 30<sup>th</sup> Anniversary Conference of the Administrative Review Council**

The strong emphasis on open government, so evident in Australia in the 1970s through to the early 1990s, has given way to renewed emphasis on confidentiality, an emphasis which has been reinforced in the face of the new threat of terrorism.

The notion that public servants will be deterred from communicating freely and directly with ministers or will not make a written record of such communications for fear that they will become subject to public scrutiny, which was discounted in cases following (the House of Lords decision) *Conway v Rimmer*, seems to be enjoying a political and bureaucratic reincarnation.

When I was Commonwealth Solicitor-General no public servant of my acquaintance would have refrained from giving frank and fearless advice because that advice might be subjected to public scrutiny.

It is worth recalling what has been said in the United Kingdom about the claim for privilege based on freedom and candour of communication with, and within, the public service in the context of disclosure in court proceedings. Lord Radcliffe, who had considerable experience in working with government in World War II and later in public inquiries, said, “I should myself have supposed Crown servants to be made of sterner stuff” and went on to criticise the tendency to suppress “everything, however commonplace, that has passed between one civil servant and another”.

And Lord Keith said: “The notion that any competent or conscientious public servant would be inhibited in the candour of his writings by consideration of the off-chance that they might have to be produced in litigation is in my opinion grotesque. To represent that the possibility of it might significantly impair the public service is even more so.”<sup>69</sup>

There are other views. For example Mulgan says the public service can only confidently advise ministers and draw to their attention all relevant matters if there is a degree of confidentiality to ensure that what is put to ministers is not subsequently used against them by other political interests.

*Departmental officials obliged to keep a public face or loyalty to ministers will hesitate about recording evidence that could be used to challenge government policy.*<sup>70</sup>

However, Mulgan emphasises that independent referees must be involved in drawing the line on where the public interest in confidentiality outweighs the public right to know.

Given the objectives of FOI, there is a need for clarification about the extent to which advice to government should be based on notions of confidentiality. While some confidentiality about some advice in some circumstances may be appropriate, blanket claims seem counter to the objective of informing public debate, and accountability for government decisions.

Through the passage of time some may have lost sight of the fact that the public interest test was included in the internal working document exemption in the first place to ensure “consideration of many factors favouring disclosure that might otherwise be ignored.”<sup>71</sup> It was not intended as a provision to encourage the development of inventive thinking about reasons to refuse access.

#### **6.8.4. Conclusive certificates**

The federal *Freedom of Information Act* includes provisions that empower ministers and in some cases the Secretary to the Cabinet and the Secretary to the Executive Council to issue a certificate that constitutes evidence that a document is exempt under particular exemption provisions of the Act.

Some state and territory Acts (ACT, Victoria) include a similar power. In NSW only one minister—the Premier—has powers to issue a ministerial certificate, but only in respect of Cabinet documents, Executive Council documents and documents concerning law enforcement and public safety.

Powers to issue certificates under the Tasmanian and South Australian Acts have been removed through amendment.

In Victoria, former premier Steve Bracks announced before the 2006 state election that the *FOI Act* would be amended to remove the relevant provisions.<sup>72</sup> This issue was not specifically mentioned in the present Premier's recent announcement about amendment of the Act.

The West Australian Act confers powers to issue a certificate. However, an amendment Bill introduced in Parliament in March 2007 would remove the powers.

There is no information available in official reports on the use of these powers. The West Australian Attorney-General told Parliament in March that powers to issue a certificate had never been exercised. In NSW the best information available indicates that two certificates have been issued since the start of the NSW Act in 1989.

At the federal level, in 2006 ministers provided answers to a question on notice about certificates issued since 1996. The information provided by 17 ministers is for the period from October 1996 until each minister answered the question late last year or early this year.

The responses revealed that 14 certificates were issued, including four in 2006. Nine of the 14 were issued by three agencies/ministers—Treasury, Prime Minister and Cabinet, and Employment and Workplace Relations.<sup>73</sup> The Cabinet document, international relations, and internal working document exemptions provided the grounds for the issue of certificates. Documents covered by certificates included information concerning legal advice on Australian citizens held at Guantanamo Bay.

The federal provision relating to the issue of a certificate for internal working documents is unique. In Open Government the Australian Law Reform Commission and the Administrative Review Council reached different conclusions about the power to issue a certificate for internal working documents. The commission recommended abolition. The council recommended that certificates should provide exemption for documents only for two years after the certificate had been issued.

The rationale for the introduction of conclusive certificates was that ultimate responsibility for decisions on access to documents about sensitive matters should lie with the relevant minister. However the Open Government Report said:

*It can be argued that highly sensitive information, release of which would not harm the public interest but which would precipitate a public accountability debate, is exactly the sort of material to which the FOI Act is designed to give access because it involves responsibility at the very highest levels of government.*<sup>74</sup>

#### **6.8.5. Powers of review**

In the McKinnon case, the High Court of Australia held that a certificate issued by the Federal Treasurer certifying that documents relating to bracket creep and the first home owners grant scheme were exempt, was a valid exercise of the powers, and that there was at least one reasonable ground for the Treasurer's claim that the public interest justified non-disclosure of the documents.

The decision confirmed a long line of earlier cases that had found that the FOI Act provided only limited opportunities for review of such a certificate. In particular, that any review of the decision to issue a certificate was limited to consideration of the grounds on which it had been issued. The Act did not provide for merits review of the decision.

The High Court decision was criticised by some commentators, particularly the finding that all that was required was a single public interest consideration to justify the certificate. The High Court by a majority decided there was no requirement to consider competing public interests, or for the Minister to reach a decision that balanced various public interest considerations for and against disclosure.

The High Court decision however left open the possibility that comments by the various judges may still provide the foundation for an argument that a broader approach should be taken to consideration of public interest factors. In a case yet to be decided by the Administrative Appeals Tribunal, Michael McKinnon has argued that comments by three of the judges (one in the majority, two in the minority) suggest that documents the subject of a certificate issued in this instance by the Secretary of the Department of Prime Minister and Cabinet are only exempt where disclosure is necessary for the protection of essential public interests. McKinnon argues that this requires consideration of broader factors than simply whether one public interest advanced in favour of non-disclosure is reasonable.

The FOI Act not only limits review to whether reasonable grounds exist for the issue of the certificate. The Act (Section 58A) provides that should review conclude no reasonable grounds existed, the minister concerned may decide not to release the documents. The obligation is only to inform the parliament within 5 sitting days and to explain the reasons for the decision.

The existence of the conclusive certificate provisions and the limited review rights have attracted criticism from, the Law Council of Australia.<sup>75</sup> Others including the Australasian Study of Parliament Group have called for the complete removal of powers to issue certificates.<sup>76</sup>

Information about important government interests – protecting the confidentiality of Cabinet deliberations, national security and other information concerning the conduct of international relations – appear to be adequately protected by specific exemptions.

Powers to issue certificates subject to only limited review seem inconsistent with the objects of FOI.

## **6.9. Quality of decisions**

There are several indicators of the quality of decisions on applications under the FOI Acts, for example, the extent to which decisions to refuse access are changed when challenged.

In 2005–2006 applications for internal review of decisions to Federal Government agencies resulted in some concession, presumably the release of additional documents, in 49 per cent of cases.<sup>77</sup>

According to the Commonwealth Ombudsman's annual report, of the 259 complaints received concerning the management of FOI applications by 44 government agencies, 21 per cent related to the decision by the agency. The Ombudsman makes no comment on any findings emerging from the investigation of these complaints.

Applications to the Administrative Appeals Tribunal for review of decisions in 2005–2006 resulted in the setting aside of a determination, or a variation in the agency determination, in 17 of 20 matters where an application was settled by consent. No details are available about the context of any concessions through provision of additional documents. Of the matters determined by the tribunal, the agency decision was affirmed in 26 cases, but varied or set aside in 23.<sup>78</sup>

A similar picture emerges from an analysis of information in state government reports on the operation of FOI.

In Victoria in 2005–2006, 67 per cent of requests for internal review resulted in affirmation of the original determination. Almost 40 per cent resulted in some variation. Of the 132 appeals to the Victorian Civil and Administrative Tribunal, the agency determination was confirmed in 59 per cent of cases.<sup>79</sup>

Similarly in South Australia, 44 per cent of applications for internal review resulted in reversal or variation of the determination. Of the complaints investigated by the Ombudsman 38 per cent resulted in a finding that they were not sustained.<sup>80</sup>

In NSW, 51 per cent of information law matters were resolved without a final hearing of the matter by the Administrative Decisions Tribunal, suggesting a high rate of settlement that satisfied the aggrieved applicant.<sup>81</sup>

The details of the outcome of review applications settled by consent or withdrawn are not known but are likely in many instances to have led to an agency decision to disclose documents additional to those released in the original determination. Overall, an agency decision to refuse access when challenged by an applicant with time, knowledge, experience and resources appear to result, in many cases, to access to additional documents over and above those released as a result of the original determination.

## **Challenging decisions**

One of Australia's most experienced FOI applicants is Michael McKinnon, now FOI editor at the Seven Network. McKinnon formerly occupied similar positions at *The Australian*, the *Courier-Mail* and the *Gold Coast Bulletin*.

McKinnon has made hundreds of applications, in recent years primarily to federal government agencies. His experience is that a preparedness to challenge a decision on access invariably results in additional access. Agencies often "dribble out" documents when original decisions are challenged. Concessions are often made as review processes move in the direction of the Administrative Appeals Tribunal. McKinnon has lodged almost 40 applications for review by the tribunal, of which 35 have been completed. In 26, the matter was dismissed, set aside or varied by consent (in other words settled on terms satisfactory to McKinnon), or resulted in the decision being set aside or varied by the tribunal, and an order that all or some documents be disclosed.<sup>82</sup>

While other applicants may be in a position to represent themselves or to engage legal representation, the average applicant who seeks access to documents only once or occasionally is clearly at a disadvantage in knowing how to respond to a decision to refuse access.

The savings in time, cost, and resources if an agency decision was based on a judgment about possible harm from disclosure is illustrated by these cases:

### **Settled on the steps of the tribunal**

An application to the Department Employment and Workplace Relations dated 30 January 2004 sought access to documents prepared during the previous 12 months concerning the minimum wage, and an assessment of the wage against the poverty line.

The response dated 8 March refused access to the 23 pages of documents relevant to the request. The four-page letter cited two exemptions—internal working documents, and operations of the agency—and spelled out public interest factors that led to the decision to refuse access.

The applicant, in a letter dated 16 March, sought internal review. The response dated 23 April confirmed the original decision, rejected the detailed public interest arguments put forward by the applicant, and again set out why disclosure would be contrary to the public interest.

The applicant lodged an application for external review of the decision by the Administrative Appeals Tribunal on 27 April. Discussions with the department followed. The matter was settled by consent. The department agreed to release all documents. In forwarding the documents on 24 June, the department said:

"As you are aware, the department has made arrangements to have the relevant documents released to you. I refer to the terms of the Consent Order, granted by the AAT on 23 June 2004, and note that the department intends not to pursue the exemption claims and agrees to provide you with access in full to each of the documents identified as falling within the scope of your request.



“The department is of the view that the documents are not such as to warrant the expenditure of the time and resources required in defending the application to the AAT.

“Notwithstanding its decision to provide you with access to the documents, the department continues to maintain that the documents were appropriately exempted from disclosure under the provisions of the *FOI Act*. The documents were preliminary drafts and never finalised. As such, they should not be in any way relied upon and may be inaccurate, out of date and misleading. I note that the documents do not necessarily represent the department’s final considered views or the position of the Government.”

The applicant subsequently brought the matter to the attention of the Ombudsman, who decided not to investigate.<sup>83</sup>

### **Four-year-old submissions released after FOI battle**

An applicant on 13 March 2007 sought access to supplementary submissions by the Australian Competition and Consumer Commission to the Dawson Committee established to review the competition provisions of the *Trade Practices Act*. The report had been published in January 2003.

On 30 April 2007 the commission responded, refusing access to two documents relevant to the application. The documents were claimed to be exempt as internal working documents and documents concerning the operations of the commission. Both exemptions require consideration of the public interest. The determination included the following:

(The public interest regarding internal working documents): “I believe the public interest requires that, for the purpose of providing frank and thorough advice to the Dawson Review Committee, the commission be able to synthesise and analyse information without opinions expressed and options canvassed being the subject of public scrutiny. I also consider that the public interest requires that the committee’s decision-making be assisted by papers which include information from a wide range of sources. I have considered the competing public interest in disclosure and I am satisfied that release would be contrary to the public interest.”

(The public interest in the operation s of the agency): “I believe that release, not just of the particular information contained in the document but documents of this nature generally would have a substantial adverse effect on the commission’s ability to obtain information upon which it relies to perform its functions. I have considered the competing public interest in disclosure and am not satisfied that the public interest in access to the information outweighs the public interest in the commission being able to effectively carry out its functions.”

The applicant sought internal review on 9 May 2007.

The commission affirmed decision to refuse access on 8 June 2007, relying on similar arguments to those used in the original decision.

The applicant lodged an application for review by the Administrative Appeals Tribunal on 26 June 2007.

On 27 August 2007 the commission advised the applicant and the Administrative Appeals Tribunal that it had reconsidered its position. The documents were released in full. The documents were made available to the applicant six weeks after the notification.<sup>84</sup>

Many decisions to refuse access are not challenged. Submissions from journalists have brought to attention several decisions to refuse access that may raise a question about the basis of a decision to deny access to documents. Although it is not possible to make an assessment without access to the documents, and to the full details of the decision, the table includes some of the many decisions brought to the attention of the audit that could be seen to be open to question.

### **A sample of unsuccessful FOI applications, based on media reports and submissions**

#### **Federal Government**

- A request (2002) to the Remuneration Tribunal for salaries of secretaries in departments was refused on the ground of Cabinet confidentiality.
- Two attempts to obtain access to family impact statements prepared on draft legislation were refused. The documents were claimed to be exempt on the basis they had been prepared for submission to Federal Cabinet. While clearly exempt on these grounds, disclosure would be likely to facilitate and encourage public debate on matters of clear public interest.
- A request for documents concerning the names of those who paid for a meeting with a federal minister during a Liberal Party convention was refused. The request and fees were returned after advice had been obtained from the Attorney-General's Department.
- An application for information about organic tampons sold in Australia was refused by the Therapeutic Goods Administration on the basis that the information was commercial in confidence.
- An application was made for the results of public opinion surveys carried out for the Department of Employment and Workplace Relations to assess the success of about \$32 million spent advertising the WorkChoices law. The department deferred access until later this year, presumably after the election. The reason for the delay was that a government committee wanted to see all the results of the surveys together. The department decided to withhold them all until such time. Using this argument, no results of any surveys ever need be released provided the government claims to have plans to conduct further surveys.

## **Victoria**

- The report of a special panel appointed to consider a proposal by AGL for a \$140 million wind farm in South Gippsland was completed in May 2005. Two applications for the report were refused. AGL decided to withdraw from the project in August 2007, just before the hearing of an appeal against the decision to refuse access to the report.
- A freelance journalist acting as a concerned citizen sought information to help understand a government decision that affected her neighbourhood. Her efforts included an unsuccessful Freedom of Information application for documents about the checks done before a convicted paedophile was released and housed in a Melbourne suburb, next to a house in which two children lived, and at the point where schoolchildren gathered each day to walk to school. This was after the person had been removed following clear evidence of a failure to check on details of the surrounding neighbourhood in making plans for his relocation. The Victorian Civil and Administrative Tribunal found it would be contrary to the public interest to release documents concerning internal consideration of his relocation. Grounds cited included that disclosure would affect the candour of future advice.
- Requests for documents containing information about violence in schools was rejected on privacy grounds.

## **Western Australia**

- The WA Health Department has refused to release the Retention and Disposal Schedule for public records.
- A request for emails between the Director-General of the WA Department of Health and former premier Brian Burke for a prescribed period resulted in no documents being provided as none could be found. When the Opposition disclosed one email already in its possession the department undertook a further search and found nine emails, not including the one held by the Opposition.

## **NSW**

- An application for documents to the NSW Government and Related Employees Appeal Tribunal for the amount paid to the former head of the Roads and Traffic Authority on termination of his contract was refused.
- The Save Beacon Hill High School Committee engaged in FOI battles over four years seeking access to documents about the Government's decision to close the school. A key document—that the government strategic plan was initially to retain the school—finally came to light through inadvertent release.
- The NSW Government approved a new coal mine in the central west of the state. An application for a report on the mine's impact was refused

- The Sydney Water Board refused access to a list of the major industrial water users despite the fact that this information has been made available by its counterparts in Brisbane (after a decision by the Information Commissioner that the document was not exempt) and Adelaide. The decision to refuse was based on the business affairs exemption and included the following reasons: “Competing companies with access to individual water use data would be positioned with an advantage to analyse the water use trends of the competition. This is more than just static information but rather a picture of trends of company performance over seasons. A competitor would find an advantage in timing their marketing strategies to improve their market share, thereby exposing the customer to a loss of potential income.”
- The University of NSW quoted the *Official Secrets Act* of Singapore in refusing access to correspondence between the university Vice-Chancellor and the Singapore Economic Development Board in connection with the decision to withdraw from the UNSW Asia Campus. The university said that as the Act would make it an offence in Singapore to disclose the documents this justified a finding of confidentiality sufficient to satisfy the exemption provision in the NSW Act.
- An application for the employment contract of the Vice-Chancellor was made to each of the 10 public universities in NSW. Three universities released the contract. Seven refused to release all or parts of the contract. Some based their decision to refuse full access on an earlier decision by the NSW Administrative Decisions Tribunal that the mere inclusion of a confidentiality clause in such a contract rendered the document exempt.
- An application to the NSW Police for details of the money spent on caterers to provide food and drink for police on duty during the Cronulla riots resulted in disclosure of the total amounts spent on particular items. Access was refused to the names of caterers and many of the details of what food was served. Names, addresses and other details of the suppliers were refused on grounds that information related to business affairs, and release could reasonably be expected to have an unreasonable adverse effect on those affairs.
- The City of Sydney Council refused to reveal the names of the restaurants it had fined for breaching the food hygiene laws. This information, and the results of the health inspections, is widely available overseas, was previously available here when all such breaches were dealt with in open court, but was claimed to be exempt by the council. Refusal of access was based on grounds that disclosure would breach the *Privacy Act* and the NSW Local Government Code of Practice, even though neither is a reason under the *FOI Act* to refuse access. Release would also have “an unreasonable adverse effect” on the businesses named. The council has continued to refuse access even though access to the same information has been granted by Blacktown and Woollahra Councils and the NSW Food Authority. The Ombudsman subsequently responded to a complaint from the *Sydney Morning Herald* about the determination, supporting the decision to refuse access on public interest grounds as the information was not about a current breach. This finding was five months after the complaint had been submitted to the Ombudsman’s office.

- An application to all NSW Area Health Services for access to documents about “unplanned” returns to surgery at local hospitals was rejected on grounds that disclosure would “adversely affect the operation of the hospitals”. The exemption in the Act includes a public interest test.
- A request for documents that would reveal hotels and clubs that generate the highest levels of revenue through poker machine turnover was refused on grounds that disclosure would endanger the life and safety of those who work in the named premises. The decision was eventually overturned by the NSW Administrative Decisions Tribunal.
- An application for details of royalties paid to NSW Forests for pulpwood from two state forests was refused on grounds of confidentiality and the effect of disclosure on business affairs. The Administrative Decisions Tribunal overturned the decision on the basis that the public interest required informed debate about the most appropriate uses of a publicly owned asset.
- A member of the public sought information about how much water the Lake Cowal goldmine was allowed to remove from the Murray Darling aquifer. The agency revealed the mine owner had 157 licences but crucial material was removed which would allow a calculation of the total amount of water the mine had the right to use. The Department of Natural Resources failed to give reasons for exempting the material, citing only the business affairs exemption. It said also the documents contained confidential material, the release of which would be “contrary to the public interest”.

### **South Australia**

- An application for information about poker machine revenue was delayed and eventually refused on the same grounds that a similar application in NSW was refused: that it would make hotels a target for robberies.
- An application for documents held by the Department for Correctional Services relating to a plan to detain David Hicks in SA was refused “as disclosure would be misleading, therefore contrary to the public interest.”
- Adelaide City Council refused to release details of investigations into food hygiene standards at outlets demanding an “advance deposit” of \$1600 to search for the documents. The FOI officer said “the business affairs of someone are as important as the public interest.” *The Advertiser* subsequently declined to pay the deposit.

### **6.10. Excessive delays and drawn-out reviews**

Time limits for responses to applications vary from 21 days in NSW to 45 days in Victoria. Other jurisdictions provide for a response within 30 days. All time limits are subject to extension in certain circumstances.

In 2005-2006, 25 per cent of applications to Federal Government agencies for non-personal documents took longer than 90 days to process, three times longer than the statutory time of 30 days (extended in some cases to 60 days). No details were provided of how much longer than 90 days was required for processing.<sup>85</sup>

Delay was a key issue identified in the 2006 special report by the Victorian Ombudsman. The Ombudsman reported only 56 per cent of decisions by government departments in 2003 were made within the statutory time frame of 45 days. Nearly 21 per cent of decisions took more than 90 days. Over 40 per cent of requests being handled by Victoria Police at any time during the period covered by the Ombudsman's review were taking more than 45 days.<sup>86</sup>

The NSW Ombudsman has also cited delay as a major problem in FOI administration.

While government agencies have benefited from new technology in the handling of information, FOI applicants are yet to enjoy any dividend from such expenditure in terms of quicker responses to requests. The Open Government Report recommended in 1995 that the maximum time for dealing with an application should be reduced to 14 days, within three years.

Despite claims that most requests are handled within the statutory time, submissions to the audit indicate that government agencies often fail to respond within the limits. Users of FOI suggest that on occasion this may be a deliberate delaying tactic and that delay is seen as a way of discouraging use of the legislation.

### **Examples of delay in responding to FOI applications**

#### **Federal Government**

- An application in 2005 to the Department of Defence for information about guarantees for the rights of Australian citizens taken into custody overseas has not been determined.
- A request to the Department of Family Services in 2006 took seven months to process.
- In April 2005, a request was made to the Australian Department of Defence seeking details of the Australian Government's stand on rendition. An advance deposit was paid in June 2005. The department advised that the statutory time limit for making a determination was 17 July. Nothing further was heard for 15 months, until December 2006. The department advised it would stand down between 23 December 2006 and 2 January 2007 inclusive and would have reduced staff during January 2007 "which may lead to further delays in finalising your FOI request". The department made further undertakings by phone to finalise the request. A determination had not been received by early September 2007.
- An application to the Department of Defence for documents relating to an investigation into forgeries of trainee work books at an air force base was submitted in July 2006. Negotiations with the department about the request took

place in the months following. Defence sought an advance deposit in December 2006. Nothing further was heard for seven months. In July 2007 a request for a further payment was received. A two-page brief dated July 2006 was the only document released. Most details had been deleted. It had taken a year to obtain the document despite the fact that third parties had not objected to release of the document with deletions.

### **Northern Territory**

- An application for a mine management plan in connection with operations at McArthur River in the Northern Territory took six months to process, arriving a few days after it was tendered in court and made public anyway.

### **Western Australia**

- Statistics on the number of drug errors at the state's main children's hospital were released after a two-year battle.

### **Queensland**

- An application submitted in 1993 seeking information from the Queensland Treasurer relating to Jupiter's Casino was the subject of a response received in June 2005.

### **NSW**

- An application for the remuneration package of the former NSW Police Commissioner was released after a 12-month battle.
- FOI submitted to Sydney Ferries on 14 March 2006 with an initial determination not being issued until 25 October 2006—almost six months late. A subsequent request for an internal review was decided on 22 December 2006. The documents were eventually released on 21 August 2007—16 months after the initial request was lodged.
- In late 2004 seven separate FOI applications were made to the NSW Police Service for details of police car chases and the policies police worked under in conducting them. All were ignored. Applications for an internal review on the basis of deemed refusal led to no disclosure of documents. Complaints were lodged with the NSW Ombudsman. Negotiations between the police and the Ombudsman continued for almost a year. They produced some documents but many were refused. Police claimed they did not have the documents and that other documents were held in archives which were inaccessible. They also complained the files were organised in a way that was different from the way the requests were structured. In the end, the police returned application and appeal cheques, apparently out of embarrassment.
- In March 2006 an application was made to NSW Police for documents concerning the decision announced that week by the NSW Government to buy a water cannon. The NSW Police replied on 13 August 2007 saying an “audit has been undertaken in regard to outstanding freedom of information files and the

above mentioned application was located and appears to be still incomplete”. NSW Police offered an apology from the Commissioner and a refund.

- In June 2005 an application was made to Railcorp for consultants’ reports on the risks of the Goulburn St parking station collapsing. The application was determined eight months later. Most documents were claimed to be exempt in total or part. An application for an internal review of the decision was not answered. After a complaint to the Ombudsman, RailCorp chief executive Vince Graham told the Ombudsman that three “redeterminations” of its decision would be completed by 28 February 2007. The Ombudsman was subsequently informed by deputy corporate counsel, “It is not intended to release any further documents pursuant to this review.” The Ombudsman’s investigation is continuing.
- Documents concerning sexual misbehaviour and workplace culture at the NSW Police College were sought in July 2005. Access was refused. Documents were released by NSW Police after an Ombudsman investigation in August 2006. The Ombudsman concluded that contrary to the NSW Police view that disclosure of the documents would prevent the proper management and assessment of personnel, “it appeared more likely that they had been claimed to be exempt because NSW Police could potentially be embarrassed by the information in them”.

### **South Australia**

- The SA Government was accused of delaying release of 30 FOI-requested documents by the Liberal Party until four days after a state election.
- An application in April 2007 for details of all disbursements from the Premier’s contingency fund for certain dates resulted in a response on July 11.

Contesting agency decisions through merit review processes can also involve long delay.

The Administrative Appeals Tribunal has performance standards for initiating proceedings and finalising matters. In the year ending 30 June 2006 it achieved its target of initiating a first conference on matters filed within 13 weeks (86 per cent), but fell short of the target for hearings within 40 weeks of commencement—only 50 per cent of matters were heard within this time. The target was 85 per cent. The tribunal’s target for finalisation of matters was 65 per cent within 12 months.

These processes do not provide speedy resolution of disputed decisions made under the *Freedom of Information Act*.

### **6.11. High cost barriers**

The various FOI Acts contain different provisions concerning fees and charges. An application fee (usually in the range of \$20-\$30) is required, but additional charges can be imposed for time spent processing, including finding documents, consultation with third parties, and consideration of the documents to make a decision on access.



The Acts also provide for a request for additional payments before the processing of the application by way of a deposit.

Paterson has commented that the charging systems that enable an agency to charge for the time spent in find documents and making a determination provide no incentive to improve inefficient recordkeeping. There is scope for charges to be used as a means of deterring unwelcome requests.<sup>87</sup>

Some Acts provide for the granting of a discount on fees and charges where public interest considerations are relevant to the disclosure of documents. Discounts are not available as a matter of routine to journalists.

At the federal level, criteria for the rebate are that payment of the charge would cause financial hardship and that the giving of access to the requested documents is in the public interest. Should these criteria be satisfied, a rebate of fees may be granted unless there are countervailing factors. One is where “the applicant could reasonably be expected to obtain a commercial or other benefit from disclosure”.

The NSW Administrative Decisions Tribunal, in a decision this year, decided an application had been made as part of the normal business activity of the *Sydney Morning Herald*. This meant that there was a commercial benefit to the applicant. The decision of the agency to refuse a rebate was upheld.<sup>88</sup> The decision in effect means that any large media organisation is unlikely to qualify.

Submissions from journalists who use FOI suggest that fee rebates on public interest grounds are rare at the state government level.

While large requests run the risk of significant cost because of the time required to process the application, the following examples, from submissions, provide an indication of the expense involved in seeking access to documents.

### **Examples of High Cost FOI Applications**

#### **Federal Government**

- The *Herald Sun* abandoned a two-year campaign seeking information about travel of federal politicians after it was quoted a fee of \$1.25 million, which amounted to 32 years of full-time work for a public servant (*Weekend Australian* 22-23 September 2001). The Administrative Appeals Tribunal accepted that those named in the list would need to be consulted before disclosure but the Government was entitled to seek payment of the costs of time spent in consultation and decision-making.
- Charges for a request for documents relating to the telecard affair involving former Minister Peter Reith were quoted at \$68,000.

- A request was submitted to the Department of Defence in relation to a specific document that included the file number on which it was held in connection with the *Tampa* rescue. While there was a minimal charge for searching for the document, \$7000 was quoted for the decision-making time.
- An application to the Department of Health and Ageing for a consultant's report on unmet child health and wellbeing needs was estimated to cost \$4843.69. The charge included "226.81 hours at \$20 an hour", a total of \$4536.24 for the decision-making time.
- The National Tertiary Education Union was told an application about workplace agreements entered into by the university sector would cost \$455,000.
- The charge for an application for documents associated with modelling for the introduction of the Federal Government's Welfare to Work policy was \$13,055.
- An application to the federal Department of Education for documents concerning South Australian school funding under the Investing in our Schools programs was estimated to cost \$20,904.
- Documents concerning the sale of the former Australian Defence Industry site at St Mary's in 2004 were estimated to cost \$10,423.05. The scope of the request was reduced and charges of \$3113.35 were paid. Ninety per cent of the documents were blacked out.
- Documents concerning vehicles leased by federal ministers and MPs involved charges of \$3307.95. A second attempt in 2007 to obtain access provided three cost options including \$13,771.60 for the information sought. The documents without names of the MPs were provided for \$51.14.
- A request for information about fuel card use of ministers and MPs resulted in a number of options from the agency including \$4682 for the documents requested.

## **NSW**

- The NSW Department of Housing estimated the cost of an application for documents concerning emergency accommodation for youths aged 15-18 at \$6090.
- The NSW Department of Corrective Services estimated the cost of an application for documents about the spending of allowances by prisoners in maximum security at Goulburn Jail at \$14,900.

## **South Australia**

- An application for documents about the proposed relocation of the Royal Adelaide Hospital resulted in a request for an advance deposit of \$15,000.

The Open Government Report included a recommendation that charges be on a fixed scale based on the amount of information released.

Applications for review of determinations by a tribunal or court can also be an expensive exercise. The cost of filing an application in the federal Administrative Appeals Tribunal is \$639.

Invariably, government agencies have legal representation in these proceedings. Applicants are often self-represented.

Even where an application to the tribunal results in additional documents being released, there are significant hurdles for an applicant who seeks reimbursement of cost associated with taking the matter to the review body.

The federal *FOI Act* provides the tribunal may recommend to the Attorney-General the payment of the costs of an applicant who is successful or substantially successful in an application for review. The tribunal must first exercise discretion to make a recommendation. The Attorney-General also has discretion to pay or not pay after such a recommendation.

The tribunal, in exercising its discretion, must have regard to whether the payment of costs would cause financial hardship to the applicant, whether the decision will be of benefit to the public through the documents being made widely available, whether the decision will be of commercial benefit to the person making the application, and the reasonableness of the decision under review.

Applicants rarely succeed with an application for costs and very little has been paid as a result of any order. In the year ending 30 June 2006 \$606 was the total recorded as paid for an applicant's litigation costs by all federal agencies. This compares with \$2,052,805 for solicitor's fees incurred by agencies and \$705,457 for agency fees for legal counsel.<sup>89</sup>

Similar cost issues face applicants in other jurisdictions who seek to challenge decisions to refuse access to documents. In NSW, the Administrative Decisions Tribunal may only award costs in limited "special" circumstances.

Where a government agency with the resources available to it challenges a tribunal decision on a question of law and takes the matter to the Supreme Court, normal cost rules apply. The FOI applicant who may be unrepresented can be ordered to pay costs if the court finds an error of law in the tribunal decision.

## **6.12. Review initiatives in 2007**

In 2007, several initiatives on FOI have been announced, indicating that some governments acknowledge the need to reform FOI legislation, and the management of FOI responsibilities.

Western Australia has introduced proposed amendments in a Bill tabled in Parliament in March 2007.<sup>90</sup> Many proposals in the Bill reflect suggestions made in the WA Commission on Government Report in 1995, and in a report of a review of the Act completed in 1997. Commentators have expressed concern about some proposals, particularly the removal of some powers from the information commissioner.<sup>91</sup>

Victoria has announced that it will undertake a rewrite of the Act and introduce changes recommended by the Ombudsman in 2006. The Premier also indicated an intention to look at broader issues concerning government transparency, including a requirement to post regularly sought documents on the internet.<sup>92</sup>

The new Premier of Queensland, Anna Bligh, announced in September that an independent review of the *FOI Act* would be undertaken by a panel chaired by David Solomon.<sup>93</sup>

In September 2007 the federal Attorney-General announced that he had asked the Australian Law Reform Commission to undertake a review of FOI to include examination of the possible harmonisation of federal and state laws, and how to reduce the administrative burden on government agencies.<sup>94</sup> The commission will also look at technological changes that have occurred since FOI was introduced and ways in which technology might be used to help access to information. The terms of reference did not mention the 1996 Open Government Report. As the commission is not required to report before the end of 2008, any reforms resulting from its work are a long way off.

### **6.13. International comparisons**

Discussion and debate about access to information and the appropriate balance between the rights to be informed about the workings of government and the need for confidentiality necessary for effective conduct of government business are not limited to Australia. Many of the problems identified in this report are also lively topics in the US, Britain and Canada, countries that have somewhat similar systems and share a commitment to democratic ideals.

Comparative law research suggests that in New Zealand, access to information initiatives have produced more balanced outcomes.<sup>95</sup> Snell explains this in terms of important differences in the legislation, and in the approach taken in New Zealand to encourage a more open information environment to improve public policy.

In the US, Congress in 2007 passed a *Freedom of Information (Amendment) Bill* designed to enshrine a commitment to disclosure and creating for the first time a FOI complaints commissioner to provide speedy independent review of decisions.

In contrast to Australian FOI legislation, US law contains only nine exemption provisions. The US since 1996 has required all federal agencies to maintain an electronic reading room to provide web access to documents released in response to an FOI application that contain information likely to be of wider interest to others.

Fee reductions apply automatically in the United States to those who seek documents about the conduct of public functions and applications by journalists. There is also scope for speeding up some applications.

Similarly in the UK, government agencies are required to adopt a publishing scheme identifying types of documents that will be published and made available as matter of routine because of their potential contribution to advancing the public interest in knowing about the operations of government and facilitating discussion and debate.

The UK FOI legislation established the position of Information Commissioner, combining responsibility for overseeing and resolving complaints about freedom of information and data protection (privacy) obligations. Decisions of the Information Commissioner requiring disclosure are binding on an agency, but may be appealed to an Information Tribunal. There have been complaints about a backlog of matters before the commissioner, but overall the review system appears to provide balanced results and reflect a strong commitment to the spirit and intention of the legislation.

#### **6.14. Scope for change**

While references to the Australian Law Reform Commission or other bodies will take time to consider there are opportunities for any government committed to enhancing the public right to know.

Snell<sup>96</sup> has suggested three steps that would offer the prospect of significant change to improve FOI performance:

##### **Step 1:**

A simple instruction should be issued by the Prime Minister and premiers to all their officials. Freedom of information will be taken seriously. Exemptions for legitimate secrets will be claimed on the basis of real harm, not far-fetched theoretical threats.

Staff and technology will be allocated to deliver quick and reliable information to citizens, not to fight them at every step.

This simple step could take place today—without the need for legislative change or a 15-month law reform investigation. And it would send a new message about how to manage public information resources in the 21st century.

##### **Step 2:**

Immediately after the election, the new government, whether led by Howard or Rudd, should adopt the key reforms suggested by the Australian Law Reform Commission in 1996 and remove ministerial discretion to issue “conclusive certificates” that block documents from public scrutiny. The key reforms proposed in 1996 were:

- Appointing an information commissioner.
- Reducing maximum processing times to 14 working days.
- Charging fees on a fixed scale based on the amount of information released.
- Improving the public interest tests in the legislation.
- Changing the object clause of the Act so courts and tribunals will interpret it in a way that promotes its objectives.

This step in conjunction with step 1 would return the *FOI Act* to the position intended for it at the start of the Hawke government in 1983.

It would be a central component in the day-to-day operations of the federal public service.

Step 3:

Ask the Australian Law Reform Commission to redesign the *FOI Act* to bring it into the information age.

A 21st century *Information Act* would make 80-90 per cent of government information, not relating to personal information, immediately accessible and searchable. Public servants would create information in the expectation that it would not only be available to their superiors, but also to anyone interested in the activities of their department.

Questions in parliament and journalists' reports on policy would happen only after all available government data was considered.

Decisions on the release of information could be made in hours or days at minimal cost - in contrast to the current inflated charges, and decisions (especially relating to non-release) often taking months.

### **6.15. Assessment**

FOI laws work reasonably to provide access to personal information about the applicant, and on occasion to information about other important matters of public interest and concern. However, several factors result in FOI working less well in accessing documents relevant to government accountability.

An issue in all jurisdictions is that governments have not taken sustained measures to deal with an enduring "culture of secrecy" still evident in many government agencies. Ministers and senior public service leaders have not been consistent strong advocates of open government principles.

FOI performance is patchy across all governments. In some agencies applications are managed in a professional manner and decisions on access reflect the law, its spirit and intent. In other cases the FOI process involves delay, high cost, and limited access to requested documents, often on grounds that suggest determined attempts to protect politically sensitive information.

Claims that FOI is achieving its intended purpose, including opening government activities to scrutiny and criticism, are not substantiated by the available evidence.

FOI, in the federal arena in particular, is marked by a high degree of legal technicality which tends to dominate considerations about whether disclosure is in the public interest, or may demonstrate harm to an essential public interest.

There are problems and inadequacies in the design of the laws; too much scope for interpretation of exemption provisions in ways that lead to refusal of access to

documents about matters of public interest and concern; cost barriers to access; and slow review processes that often fail to provide cost-effective resolution of complaints.

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<sup>1</sup> Freedom of Information Acts :

*Freedom of Information Act* (Cth) 1982; *Freedom of Information Act* (Vic) 1983; *Freedom of Information Act* (NSW) 1989; *Freedom of Information Act* (ACT) 1989; *Freedom of Information Act* (SA) 1991; *Freedom of Information Act* (Tas) 1991; *Freedom of Information Act* (Qld) 1992; *Freedom of Information Act* (WA) 1992; *Official Information Act* (NT) 2002

<sup>2</sup> Nigel Waters, "Print Media use of the Freedom of information Laws in Australia" *Australian Centre for Independent Journalism* 1999  
and

Bryony Evans "The Use by Journalists of the Australian FOI Regime" *Australian Press Council* 2002

<sup>3</sup> NSW Ombudsman annual report 2005–2006 Chapter 12

<sup>4</sup> Submission – Matthew Moore, *Sydney Morning Herald*

<sup>5</sup> Federal Attorney-General Philip Ruddock: Media release 005/2007, *Freedom of Information Act annual report* Tabled <<http://www.ag.gov.au>>

<sup>6</sup> *Freedom of Information Act* Memorandum 98 Prepared for the Attorney-General's Department 31 December 2005

<[http://www.ag.gov.au/www/agd/agd.nsf/Page/FreedomofInformation\\_FOImemoranda\\_FOIGuidelines-ExemptionssectionsintheFOIAct-31December2005#a\\_1\\_1](http://www.ag.gov.au/www/agd/agd.nsf/Page/FreedomofInformation_FOImemoranda_FOIGuidelines-ExemptionssectionsintheFOIAct-31December2005#a_1_1)>

Accessed 30 August 2007

<sup>7</sup> Peter Costello, Speech on "Economic reform Directions and the Role of the Public Service" Australian Public Service Commission Ministerial Conversations, Canberra. 2 November 2005  
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<sup>8</sup> *Australian Postal Corporation v Johnston* [2007] FCA 386

<sup>9</sup> *Freedom of Information Act* 1982: Fundamental Principles and Procedures Attorney-General's Department, Canberra, December 2005, 2.7

<sup>10</sup> Federal Attorney General's Department, *Freedom of Information annual report 2005-2006*, Table 3

<sup>11</sup> Dr Gareth Griffith (NSW Parliamentary Library), *Freedom of Information – Issues and Recent Developments in NSW Briefing Paper* (06-2007) Page 83

<sup>12</sup> Some of the reports on examination of state FOI laws include:

Legal, Constitutional and Administrative Review Committee (Qld Part), "*Freedom of Information in Queensland*", Report No 32 (Dec 2001);

Legal and Constitutional Committee (Vic Part), "*Report upon Freedom of Information in Victoria*", 38th Report (Nov 1989);

Legislative Council Select Committee (Tas Part), "*Freedom of Information*" (Feb 1997);

Ministry of Justice (WA), "*Review of the Freedom of Information Act 1992*" (Oct 1997);

South Australian Legislative Review Committee, "*Report of the Legislative Review Committee Concerning the Freedom of Information Act 1991*" (Sept 2000);

Standing Committee on Justice and Community Safety of the Australian Capital Territory Legislative Assembly, "*The Freedom of Information (Miscellaneous Amendment) Bill 1998*", Report No 17 (Aug 2001);

NSW Ombudsman, "*Special Report to Parliament by the Office of the NSW Ombudsman Proposing Amendments to the Freedom of Information Act 1989*";

NSW Committee on the Office of the Ombudsman and Police Integrity Commission, First Report on the inquiry into access to information 2002; NSW Auditor General's Report, Performance Audit Freedom of Information August 2003;

Review of *Freedom of Information Act* (Victorian Ombudsman 2006)

<sup>13</sup> Australian Law Reform Commission and the Administrative Review Council "*Open Government: A Review of the Federal Government Freedom of Information Act 1982 Report 77*" 1995

<sup>14</sup> "Open Government" Report (as above) 2.12

<sup>15</sup> Rick Snell, "Freedom of Information: The Experience of the Australian States—an Epiphany?" *Federal Law Review* Volume 29, 2001, 343-358 at 351.

<sup>16</sup> Liberal Party Law and Justice Policy February 1996 as quoted in *Administrative Law under the Coalition Government* (John McMillan – Editor) 1997 p87

<sup>17</sup> "Scrutinising Government" Commonwealth Ombudsman Report 02/2006, March 2006

<sup>18</sup> Review of the *Freedom of Information Act* Victorian Ombudsman June 2006.

<sup>19</sup> Professor John McMillan, Commonwealth Ombudsman "Open Government – Reality or rhetoric?", Canberra 15 June 2006

<sup>20</sup> Ombudsman Victoria annual report 2007 at 20 – 21

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- <sup>21</sup> NSW Ombudsman annual report 2004–2005 Chapter 10
- <sup>22</sup> For example, Dr Moira Paterson “*Freedom of Information and Privacy in Australia*” 2005; research papers by Rick Snell of the University of Tasmania < <http://ricksnell.com.au/> > ; Dr Bill De Maria, “*Rescuing FOI: Rescuing democracy*” “*The Drawing Board: An Australian Review of Public Affairs*” Vol 2 No 3 March 2002 p167-185; A Cossins, “*Annotated Freedom of Information Act NSW*” LBC Information Services 1997
- <sup>23</sup> “Need to Know” Commonwealth Ombudsman 1999
- <sup>24</sup> “Scrutinising Government” (as above) 7.3
- <sup>25</sup> Ken Henry, “From Timber to Tax” *Canberra Times* 23 January 2006  
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- <sup>27</sup> Submission, Michael McKinnon, Channel 7
- <sup>28</sup> News Limited submission
- <sup>29</sup> Commonwealth Ombudsman’s annual report 2005-2006, Chapter 7
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- <sup>31</sup> Andrew Podger interview with Kerry O’Brien on *7:30 Report*, 26 June 2007
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- <sup>37</sup> *Tunchon v Commissioner of Police, NSW Police Service* (2000) NSW ADT 73 at 18
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- <sup>40</sup> Administrative Review Council, Report 42 “The Contracting Out of Government Services” 1998
- <sup>41</sup> NSW Law Reform Commission, “Terms of Reference – Privacy”  
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- <sup>53</sup> NSW Legislative Assembly, Parliamentary Debates 1988 p4301
- <sup>54</sup> NSW Ombudsman annual report 2003–2004 P99
- <sup>55</sup> Chris Wheeler, Deputy NSW Ombudsman “FOI – The need for review” Government Lawyers CLE Conference, Sydney 30 October 2007.
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- <sup>64</sup> *WorkCover Authority v Law Society of NSW* [2006] NSWCA 84
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- <sup>66</sup> *McKinnon v Secretary, Department of Treasury* [2006] 22 ALR 187
- <sup>67</sup> *Emery v Department of Employment and Workplace Relations* [2007] AATA 1513 – Deputy President Forgie
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- <sup>69</sup> Admin Review 58 May 2007 p13  
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- <sup>70</sup> Dr Richard Mulgan, "Truth in Government and the Politicisation of Public Service Advice" Asia Pacific School of Economics and Government ANU, Discussion Paper 06-02
- <sup>71</sup> Senate Standing Committee on Constitutional and Legal Affairs: Freedom of Information Bill 1979, para 5.23
- <sup>72</sup> *The Age* "Bracks puts democracy on the election bandwagon" 17 November 2006
- <sup>73</sup> Questions on Notice: Conclusive Certificates, Senate Hansard, 9 August 2006; 15 August 2006; 4 September 2006; 5 September 2006; 9 October 2006.
- <sup>74</sup> Open Government Report (as above) 8.17
- <sup>75</sup> Law Council of Australia, "Major Parties Fall Short on Legal Aid Funding Despite Budget Surplus of \$28b for Past Two Years" 26 September 2007" <http://www.lawcouncil.asn.au/get/media/2443039439.pdf>
- <sup>76</sup> "Be Honest, Minister!: Restoring honest government in Australia" 2007
- <sup>77</sup> Federal Attorney-General's Department, Freedom of Information annual report 2005-2006, 2.7
- <sup>78</sup> Federal Attorney-General's Department, Freedom of Information annual report 2005-2006, Appendix F
- <sup>79</sup> Victorian Attorney-General annual report on Operation of *Freedom of Information Act* 2005-2006 Part 2 p5
- <sup>80</sup> Minister for Administrative Services, SA annual report, *Freedom of Information Act* 2005-2006 "Activity under the Act"
- <sup>81</sup> NSW Administrative Decisions Tribunal, annual report 2005–2006 P14
- <sup>82</sup> Submission Michael McKinnon Channel 7
- <sup>83</sup> Submission Michael McKinnon Channel 7
- <sup>84</sup> Documents provided by Brent Fisse
- <sup>85</sup> Federal Attorney-General's Department, Freedom of Information annual report 2005-2006, Tables 7 - 10
- <sup>86</sup> Ombudsman Victoria, Review of *Freedom of Information Act*, June 2006
- <sup>87</sup> Dr Moira Paterson submission
- <sup>88</sup> *Stephanie Peatling v Department of Employment and Workplace Relations* (2007) AATA 1011
- <sup>89</sup> Federal Attorney-General's Department, Freedom of Information annual report 2005-2006, Table 20
- <sup>90</sup> Second reading speech. WA Legislative Assembly, 28 March 2007
- <sup>91</sup> Chris Merritt, "AG, Commissioner clash on FOI reform", *The Australian*, 30 March 2007
- <sup>92</sup> Media release "Brumby vows to strengthen accountability in Victoria" 7 August 2007 Premier's website <[www.premier.vic.gov.au/newsroom/news\\_item.asp?id=1105](http://www.premier.vic.gov.au/newsroom/news_item.asp?id=1105)>
- <sup>93</sup> "Peeling back the lid is one bold step for Bligh" *Sydney Morning Herald* 18 October 2007
- <sup>94</sup> Australian Law Reform Commission, "Freedom of Information Inquiry" 24 September 2007  
<http://www.alrc.gov.au/inquiries/current/FOI/index.html>
- <sup>95</sup> Rick Snell, "The Kiwi Paradox – A comparison of freedom of information in Australia and New Zealand", *Federal Law Review* (2001) 575-616
- <sup>96</sup> Rick Snell, "Three quick steps to enlightened FOI" *The Australian* 28 September 2007  
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Since the finalisation of the content of this chapter, Annual Reports for the year ending 30 June 2007 have been published by the Western Australian Information Commissioner, the Commonwealth Ombudsman and the NSW Ombudsman.

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## **NSW Freedom of Information Act 1989 No 5**

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### **Schedule 1 Exempt documents**

(Section 6 (1))

#### **Part 1 Restricted documents**

##### **1 Cabinet documents**

(1) A document is an exempt document:

- (a) if it is a document that has been prepared for submission to Cabinet (whether or not it has been so submitted), or
- (b) if it is a preliminary draft of a document referred to in paragraph (a), or
- (c) if it is a document that is a copy of or of part of, or contains an extract from, a document referred to in paragraph (a) or (b), or
- (d) if it is an official record of Cabinet, or
- (e) if it contains matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet.

(2) A document is not an exempt document by virtue of this clause:

- (a) if it merely consists of factual or statistical material that does not disclose information concerning any deliberation or decision of Cabinet, or
- (b) if 10 years have passed since the end of the calendar year in which the document came into existence.

(3) Subclause (2) (b) does not apply to a document that came into existence before the commencement of this clause.

(4) In this clause, a reference to Cabinet includes a reference to a committee of Cabinet and to a subcommittee of a committee of Cabinet.

##### **2 Executive Council documents**

(1) A document is an exempt document:

- (a) if it is a document that has been prepared for submission to the Executive Council (whether or not it has been so submitted), or
- (b) if it is a preliminary draft of a document referred to in paragraph (a), or
- (c) if it is a document that is a copy of or of part of, or contains an extract from, a document referred to in paragraph (a) or (b), or
- (d) if it is an official record of the Executive Council, or
- (e) if it contains matter the disclosure of which would disclose information concerning any deliberation or advice of the Executive Council.

(2) A document is not an exempt document by virtue of this clause:

- 
- (a) if it merely consists of:
    - (i) matter that appears in an instrument that has been made or approved by the Governor and that has been officially published (whether in the Gazette or elsewhere), or
    - (ii) factual or statistical material that does not disclose information concerning any deliberation or advice of the Executive Council, or
  - (b) if 10 years have passed since the end of the calendar year in which the document came into existence.
- (3) Subclause (2) (b) does not apply to a document that came into existence before the commencement of this clause.

### **3 (Repealed)**

### **4 Documents affecting law enforcement and public safety**

- (1) A document is an exempt document if it contains matter the disclosure of which could reasonably be expected:
- (a) to prejudice the investigation of any contravention or possible contravention of the law (including any revenue law) whether generally or in a particular case, or
  - (b) to enable the existence or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be ascertained, or
  - (c) to endanger the life or physical safety of any person, or
  - (d) to prejudice the fair trial of any person or the impartial adjudication of any case, or
  - (e) to prejudice the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law (including any revenue law), or
  - (f) to prejudice the maintenance or enforcement of any lawful method or procedure for protecting public safety, or
  - (g) to endanger the security of any building, structure or vehicle, or
  - (h) to prejudice any system or procedure for the protection of persons or property, or
  - (i) to facilitate the escape from lawful custody of any person.
- (2) A document is not an exempt document by virtue of subclause
- (a) if it merely consists of:
    - (i) a document revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law, or
    - (ii) a document containing a general outline of the structure of a programme adopted by an agency for dealing with any contravention or possible contravention of the law, or
    - (iii) a report on the degree of success achieved in any programme adopted by an agency for dealing with any contravention or possible contravention of the law, or
    - (iv) a report prepared in the course of a routine law enforcement inspection or investigation by an agency whose functions include that of enforcing the law (other than the criminal law), or

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- (v) a report on a law enforcement investigation that has already been disclosed to the person or body the subject of the investigation, and
  - (b) if disclosure of the document would, on balance, be in the public interest.
- (3) A document is an exempt document if it is a document that has been created by:
- (a) the former Information and Intelligence Centre of the Police Service or the former State Intelligence Group, or
  - (b) the Counter Terrorist Co-ordination Command of the NSW Police Force, the former Protective Security Group of the Police Service, the former Special Branch of the Police Service or the former Bureau of Criminal Intelligence.
- (3A) A document is an exempt document if it is a document that has been created by the State Crime Command of the NSW Police Force in the exercise of its functions concerning the collection, analysis or dissemination of intelligence.
- (3B) A document is an exempt document if it is a document that has been created by the Corrections Intelligence Group of the Department of Corrective Services in the exercise of its functions concerning the collection, analysis or dissemination of intelligence.
- (3C) A document is an exempt document if it is a document that has been created by the Drug Intelligence Unit of the Department of Juvenile Justice in the exercise of its functions concerning the collection, analysis or dissemination of intelligence.
- (4) In this clause, a reference to the law includes a reference to the law of the Commonwealth, the law of another State and the law of another country.

#### **4A Documents affecting counter-terrorism measures**

- (1) In this clause:
- terrorist act** has the same meaning as in the [Terrorism \(Police Powers\) Act 2002](#).
- (2) A document is an exempt document if it contains matter the disclosure of which could reasonably be expected:
- (a) to facilitate the commission of a terrorist act, or
  - (b) to prejudice the prevention of, preparedness against, response to, or recovery from, the commission of a terrorist act.
- (3) A document is not an exempt document by virtue of subclause
- (a) if it merely consists of:
    - (i) a document revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law, or
    - (ii) a report on a law enforcement investigation that has already been disclosed to the person or body the subject of the investigation, and

- 
- (b) if disclosure of the document would, on balance, be in the public interest.
  - (4) In this clause, a reference to the law includes a reference to the law of the Commonwealth, the law of another State and the law of another country.

## **Part 2 Documents requiring consultation**

### **5 Documents affecting inter-governmental relations**

A document is an exempt document if it contains matter:

- (a) the disclosure of which:
  - (i) could reasonably be expected to cause damage to relations between the Government of New South Wales and the Government of the Commonwealth or of another State, or
  - (ii) would divulge information communicated in confidence by or on behalf of the Government of the Commonwealth or of another State to the Government of New South Wales or to an agency or other person or body receiving the communication on behalf of the Government of New South Wales, and
- (b) the disclosure of which would, on balance, be contrary to the public interest.

### **6 Documents affecting personal affairs**

- (1) A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (whether living or deceased).
- (2) A document is not an exempt document by virtue of this clause merely because it contains information concerning the person by or on whose behalf an application for access to the document is being made.

### **7 Documents affecting business affairs**

- (1) A document is an exempt document:
  - (a) if it contains matter the disclosure of which would disclose trade secrets of any agency or any other person, or
    - (a1) if it contains matter the disclosure of which would disclose the commercial-in-confidence provisions of a government contract (within the meaning of section 15A), or
  - (b) if it contains matter the disclosure of which:
    - (i) would disclose information (other than trade secrets or commercial-in-confidence provisions) that has a commercial value to any agency or any other person, and
    - (ii) could reasonably be expected to destroy or diminish the commercial value of the information, or
  - (c) if it contains matter the disclosure of which:
    - (i) would disclose information (other than trade secrets, commercial-in-confidence provisions or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or any other person, and

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- (ii) could reasonably be expected to have an unreasonable adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency.
- (2) A document is not an exempt document by virtue of this clause merely because it contains matter concerning the business, professional, commercial or financial affairs of the agency or other person by or on whose behalf an application for access to the document is being made.

## **8 Documents affecting the conduct of research**

- (1) A document is an exempt document if it contains matter the disclosure of which:
- (a) would disclose the purpose or results of research (including research that is yet to be commenced or yet to be completed), and
  - (b) could reasonably be expected to have an unreasonable adverse effect on the agency or other person by or on whose behalf the research is being, or is intended to be, carried out.
- (2) A document is not an exempt document by virtue of this clause merely because it contains matter concerning research that is being, or is intended to be, carried out by the agency or other person by or on whose behalf an application for access to the document is being made.

## **Part 3 Other documents**

### **9 Internal working documents**

- (1) A document is an exempt document if it contains matter the disclosure of which:
- (a) would disclose:
    - (i) any opinion, advice or recommendation that has been obtained, prepared or recorded, or
    - (ii) any consultation or deliberation that has taken place, in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency, and
  - (b) would, on balance, be contrary to the public interest.
- (2) A document is not an exempt document by virtue of this clause if it merely consists of:
- (a) matter that appears in an agency's policy document, or
  - (b) factual or statistical material.

### **10 Documents subject to legal professional privilege**

- (1) A document is an exempt document if it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.
- (2) A document is not an exempt document by virtue of this clause merely because it contains matter that appears in an agency's policy document.

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## **11 Documents relating to judicial functions etc**

A document is an exempt document if it contains matter the disclosure of which would disclose:

- (a) matter relating to the judicial functions of a court or tribunal, or
- (b) matter prepared for the purposes of proceedings (including any transcript of the proceedings) that are being heard or are to be heard before a court or tribunal, or
- (c) matter prepared by or on behalf of a court or tribunal (including any order or judgment made or given by the court or tribunal) in relation to proceedings that are being heard or have been heard before the court or tribunal.

## **12 Documents the subject of secrecy provisions**

- (1) A document is an exempt document if it contains matter the disclosure of which would constitute an offence against an Act, whether or not the provision that creates the offence is subject to specified qualifications or exceptions.
- (2) A document is not an exempt document by virtue of this clause unless disclosure of the matter contained in the document, to the person by or on whose behalf an application for access to the document is being made, would constitute such an offence.

## **13 Documents containing confidential material**

A document is an exempt document:

- (a) if it contains matter the disclosure of which would found an action for breach of confidence, or
- (b) if it contains matter the disclosure of which:
  - (i) would otherwise disclose information obtained in confidence, and
  - (ii) could reasonably be expected to prejudice the future supply of such information to the Government or to an agency, and
  - (iii) would, on balance, be contrary to the public interest.

## **14 Documents affecting the economy of the State**

A document is an exempt document if it contains matter the disclosure of which:

- (a) could reasonably be expected:
  - (i) to have a substantial adverse effect on the ability of the Government or an agency to manage the economy of the State, or
  - (ii) to expose any person or class of persons to an unfair advantage or disadvantage as a result of the premature disclosure of information concerning any proposed action or inaction of the Parliament, the Government or an agency in the course of, or for the purpose of, managing the economy of the State, and

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- (b) would, on balance, be contrary to the public interest.

### **15 Documents affecting financial or property interests**

A document is an exempt document if it contains matter the disclosure of which:

- (a) could reasonably be expected to have a substantial adverse effect on the financial or property interests of the State or an agency, and
- (b) would, on balance, be contrary to the public interest.

### **16 Documents concerning operations of agencies**

A document is an exempt document if it contains matter the disclosure of which:

- (a) could reasonably be expected:

- (i) to prejudice the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency, or
- (ii) to prejudice the attainment of the objects of any test, examination or audit conducted by an agency, or
- (iii) to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel, or
- (iv) to have a substantial adverse effect on the effective performance by an agency of the agency's functions, or
- (v) to have a substantial adverse effect on the conduct of industrial relations by an agency, and

- (b) would, on balance, be contrary to the public interest.

### **17 Documents subject to contempt etc**

A document is an exempt document if it contains matter the public disclosure of which would, but for any immunity of the Crown:

- (a) constitute contempt of court, or
- (b) contravene any order or direction of a person or body having power to receive evidence on oath, or
- (c) infringe the privilege of Parliament.

### **18 Documents arising out of companies and securities legislation**

- (1) A document is an exempt document if it contains matter that appears in:

- (a) a document for the purposes of the Ministerial Council for Companies and Securities that has been prepared by, or received by an agency or Minister from, the Commonwealth or another State, or
- (b) a document the disclosure of which would disclose the deliberations or decisions of the Ministerial Council for Companies and Securities, other than a document by which a decision of the Council has been officially published, or
- (c) a document that has been furnished to the National Companies and Securities Commission by the Commonwealth, or by this or any other State, and that relates solely to the functions of the Commission in



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- relation to the law of the Commonwealth or the law of this or any other State, or
- (d) a document (other than a document referred to in paragraph (c)) that is held by the National Companies and Securities Commission and that relates solely to the exercise of the functions of the Commission under the law of the Commonwealth or the law of this or any other State.
- (2) A document is an exempt document if it contains matter that appears in:
- (a) a document for the purposes of the Ministerial Council for Corporations that has been prepared by, or received by an agency or Minister from, the Commonwealth or another State, or
- (b) a document the disclosure of which would disclose the deliberations or decisions of the Ministerial Council for Corporations, other than a document by which a decision of the Council has been officially published, or
- (c) a document that has been furnished to the Australian Securities and Investments Commission by the Commonwealth, or by this or any other State, and that relates solely to the functions of the Commission in relation to the law of the Commonwealth or the law of this or any other State, or
- (d) a document (other than a document referred to in paragraph (c)) that is held by the Australian Securities and Investments Commission and that relates solely to the exercise of the functions of the Commission under the law of the Commonwealth or the law of this or any other State.

(3) In this clause:

***Australian Securities and Investments Commission*** means the body established by section 7 of the [Australian Securities and Investments Commission Act 1989](#) of the Commonwealth and continued in existence by section 261 of the [Australian Securities and Investments Commission Act 2001](#) of the Commonwealth.

***Ministerial Council for Corporations:***

- (a) means the Ministerial Council for Corporations originally established by the Corporations Agreement dated 23 September 1997 between the Governments of the Commonwealth, the States and the Northern Territory, and
- (b) includes any body that is a continuation of, or a successor to, the Council under any subsequent agreement between those Governments.

## **19 Private documents in public library collections**

(1) A document is an exempt document:

- (a) if it has been created otherwise than by an agency, or otherwise than by a Minister, in relation to the functions of an agency, and
- (b) if it is held in a public library subject to a condition imposed by the person or body (not being an agency or Minister) by whom it has been placed in the possession of the library:
- (i) prohibiting its disclosure to members of the public generally or to certain members of the public, or
- (ii) restricting its disclosure to certain members of the public.

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(2) In this clause, a reference to a public library includes a reference to:

- (a) an agency referred to in section 11 (1) (a)–(e), and
- (b) a library that forms part of a university, college of advanced education or college of technical and further education.

## **20 Miscellaneous documents**

(1) A document is an exempt document if it contains matter the disclosure of which would disclose:

- (a) matter relating to adoption procedures under the [Adoption Act 2000](#), or
- (b) information contained in the Register of Interests kept by the Premier pursuant to the Code of Conduct for Ministers of the Crown adopted by Cabinet, or
- (c) matter relating to the receipt of an amended or original birth certificate or of prescribed information under the [Adoption Act 2000](#), or
- (d) matter relating to a protected disclosure within the meaning of the [Protected Disclosures Act 1994](#), or
- (e) a write-off policy referred to in section 101 of the [Fines Act 1996](#), or
- (f) matter relating to an investigation or inquiry into a railway accident or incident under section 66, 67 or 67B of the [Rail Safety Act 2002](#), or
- (g) matter relating to an investigation or inquiry into a transport accident or incident under section 46BA or 46BC of the [Passenger Transport Act 1990](#).

(2) Despite subclause (1) (f), a document containing matter referred to in that paragraph ceases to be an exempt document:

- (a) in the case of a document containing matter relating to an inquiry under section 66 into an accident or incident that is not also the subject of an investigation under section 67 or an inquiry under section 67B, if the inquiry under section 66 is included in a list forwarded to the Minister under that section, or
- (b) in the case of a document containing matter relating to an investigation under section 67 or an inquiry under section 67B, when the report into the investigation or inquiry is tabled before both Houses of Parliament.

(3) Despite subclause (1) (g), a document containing matter referred to in that paragraph ceases to be an exempt document when the report into the investigation or inquiry is tabled before both Houses of Parliament.

## **21 Exempt documents under interstate Freedom of Information legislation**

(1) A document is an exempt document:

- (a) if it contains matter the disclosure of which would disclose information communicated to the Government of New South Wales by the Government of the Commonwealth or of another State, and
- (b) if notice has been received from the Government of the Commonwealth or of the other State that the information is exempt matter within the meaning of a corresponding law of the Commonwealth or that other State.

(2) In this clause, a reference to a corresponding law is a reference to:

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- (a) the [Freedom of Information Act 1982](#) of the Commonwealth, or  
(b) the [Freedom of Information Act 1982](#) of Victoria.

## **22 Documents containing information confidential to Olympic Committees**

A document is an exempt document if it has been prepared by or received by the Sydney Organising Committee for the Olympic Games, the Olympic Coordination Authority or the Olympic Roads and Transport Authority and contains matter that is confidential to the International Olympic Committee or the Australian Olympic Committee.

### **22A Documents containing information confidential to International Masters Games Association**

A document is an exempt document if it has been prepared by or received by the Sydney 2009 World Masters Games Organising Committee and contains matter that is confidential to the International Masters Games Association.

## **23 Documents containing information relating to threatened species, Aboriginal objects and Aboriginal places**

A document is an exempt document if it is the subject of a declaration referred to in section 161 of the [National Parks and Wildlife Act 1974](#).

## **24 Documents relating to threatened species conservation**

- (1) A document is an exempt document if it contains matter that the Director-General under the [Threatened Species Conservation Act 1995](#) has determined should not be disclosed to the public under section 146 of that Act.
- (2) A document is an exempt document if it contains matter that the Scientific Committee under the [Threatened Species Conservation Act 1995](#) has recommended to the Minister should not be disclosed to the public under section 146A of that Act and the Minister has accepted that recommendation.

## **25 Plans of management containing information relating to places or items of Aboriginal significance**

A plan of management, and a draft plan of management, for an area of community land under Division 2 of Part 2 of Chapter 6 of the [Local Government Act 1993](#) is an exempt document if it is the subject of a resolution of confidentiality referred to in section 36DA (2) of that Act.

## **26 Documents relating to complaints under health legislation**

A document provided by the Health Care Complaints Commission to a registration authority (within the meaning of the [Health Care Complaints Act 1993](#)) relating to a particular complaint is an exempt document.

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## CHAPTER 7

### ANTI-TERRORISM AND SEDITION

#### EXECUTIVE SUMMARY

Australian anti-terrorism laws have been designed to significantly reduce the judicial watch on the executive power inherent in their operation. Even where such oversight is permitted, the laws restrict the media's ability to report and curtail the ability of people to communicate with journalists and others. While we discern general acceptance (including among media organisations) that threats from terrorism require a solid response, the essential issue is the extent to which it is reasonable to sacrifice basic freedoms in the cause of defending them.

The effect of anti-terrorism legislation means we are almost certainly unaware of the number of cases in which the legislation has been applied and the extent to which reporting on them has been prevented.

At least seven federal Acts provide for substantial penalties for those who breach their provisions.

The *Criminal Code Act* 1995 defines a "terrorist act" in section 100.1. The definition is broad. Vagueness in this area always invites the apprehension (if not ultimately the reality) of abuse in those, including the news media, potentially affected by the legislation.

The *Australian Security Intelligence Organisation Act* 1979 provides for the issue of warrants to question and detain people (clearly including journalists) where it is reasonably believed the warrant "*will substantially assist the collection of intelligence that is important in relation to a terrorism offence*". Again, this is a broad definition, characterised by vagueness.

The obvious problems with section 9A of the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act* 2007 relate to the vagueness of the phrases "indirectly counsels or urges" and "indirectly provides instruction".

An example: Following clearance by the AFP, the DPP and the Classification Board, of eight books seized from Muslim bookshops, the federal Attorney-General, Philip Ruddock, in July 2006 referred the books to the Classification Review Board. It refused classification of two books on the basis that they promoted "jihad" and incited terrorism. The other six were given unrestricted classification. These were the first two books banned in Australia since 1973.

Once tried in relation to terrorism, the urge to ban can spill into other areas. In January 2007, after approval of Dr Phillip Nitschke's euthanasia manual *The Peaceful Pill Handbook*, the Attorney-General referred it to the Classification Review Board. This resulted in the book being banned at the end of February 2007.

## Sedition

The last prosecution for sedition in Australia was in 1960 when Brian Cooper was sentenced to two months' jail with hard labour for urging the natives of Papua New Guinea to demand independence from Australia. This followed the two previous cases, both in NSW - an unsuccessful prosecution in 1953 and the sentencing in 1950 of William Burns to six months' jail for writing seditious articles.

The *Anti-Terrorism Act (No. 2) 2005* repealed most of the existing sedition provisions of the *Crimes Act 1914* and replaced them with new provisions. These new provisions have been widely criticised, especially in submissions to the Australian Law Reform Commission review in 2006. Dr Ben Saul of the Gilbert+Tobin Centre of Public Law at UNSW submitted that there was no case for “modernising” sedition law because of a history of its manipulative use against legitimate political opponents; the prosecution of trivial statements which lack any real connection to violence; its propensity to unjustifiably interfere with freedom of expression and opinion; its historically vague, uncertain and unpredictable scope; its modern redundancy in light of many overlapping (but more precisely framed) offences; its disuse over many decades; and widespread public unease about—and considerable ridicule of—sedition offences.

The principal problems with the provisions have been identified as:

- the imprecision of the key verb “to urge”;
- it is no longer necessary to prove an intention to promote ill-will and hostility to establish seditious intent;
- there is no requirement that the person “urging” have any particular intention, such as in the previous *Crimes Act*;
- violence need not be violence incited within the Australian community—it would suffice that the urging occurred to a group of a different nationality or political opinion to use force against any other person in any other place, the effect of which would “threaten” the peace of the Commonwealth;
- the urging need only be to engage in conduct that provides assistance to a (vaguely defined) organisation engaged in armed hostilities against the Australian Defence Force. This could extend to verbal support for insurgent groups who might encounter the ADF in their country;
- inciting terrorism is unlawful under pre-existing law. This indicates these provisions will extend to the murkier concept of “indirect urging” as well as condoning or justifying terrorism or even abstract opinions about that conduct;
- section 80.4 extends the geographical reach of the provisions via the *Criminal Code* so any “offence will be committed whether or not the conduct or the result of the conduct constituting the offence occurs in Australia”. It covers any person of any citizenship or residence. There is no foreign law defence. It in effect creates a universal jurisdiction.

## CHAPTER 7

### ANTI-TERRORISM AND SEDITION

#### 7.1. Introduction

The deadly terrorist attacks on New York's World Trade Centre and the Pentagon in Washington on 11 September 2001 ("9/11") generated waves of anti-terrorist legislation in Australia and similar countries. While badged with the impeccable objectives of deterring, detecting, disrupting and ultimately punishing terrorism, the legislation indicates some governments have perhaps too readily succumbed to the temptation to use 9/11 to expand laws with dubiously justified infringements of free speech and other civil liberties. Novel departures have been made from the presumption of innocence, trial by jury and freedom of association. In terms of the healthy functioning of the democracy such laws purport to protect, one of the most serious consequences has been on the news media's capacity to report on terrorism-related stories.

In Australia, Professor Mark Pearson has summarised these effects as follows:<sup>1</sup>

- leaving reporters exposed to new detention and questioning regimes;
- exposing journalists to new surveillance techniques;
- seizing journalists' notes and computer archives;
- closing certain court proceedings, thus leaving matters unreportable;
- suppressing certain details related to terrorism matters and exposing journalists to fines and jail if they report them;
- restricting journalists' movement in certain areas where news might be happening;
- exposing journalists to new risks by merely associating or communicating with some sources; and
- exposing journalists to criminal charges if they publish some statements deemed to be inciting or encouraging terrorism.

Australian anti-terrorism laws have been designed to significantly reduce the judicial watch on the expanded executive power and discretion inherent in their operation. Even where such oversight is permitted, the laws restrict the media's ability to report proceedings and curtail the ability of parties to communicate with journalists and others. While we discern general acceptance (including among media organisations) that the real threats from terrorism require a solid response, the essential issue is the extent to which it is reasonable to sacrifice basic democratic freedoms in the cause of defending them.

In terms of this audit, the effect of current anti-terrorism legislation means we are almost certainly unaware of the number of cases in which the legislation has been applied and the extent to which reporting on them has been prevented.

After 9/11 and the federal election in November 2001, a summit of Commonwealth, state and territory leaders was held in Canberra on 5 April 2002. There, state governments referred their powers over terrorism offences to the Commonwealth. The *Criminal Code Amendment (Terrorism) Act 2003* provides for the Commonwealth to legislate in this area, with agreement from the states for any future amendments.<sup>2</sup> As a result there has been relatively little state and territory legislation and that has been largely confined to preventative detention and local police powers. See annexure A for a full list of federal and state provisions.

## **7.2. Commonwealth terrorism legislation affecting news media**

This summary is largely based on research conducted for the audit by Mallesons Stephen Jaques (Sydney) on the state of the legislation at August 2007, material on the Commonwealth Parliamentary Library website and a paper prepared by Minter Ellison (Melbourne).<sup>3</sup> The issue of sedition is dealt with separately.

### *Criminal Code Act 1995*

A “terrorist act” is defined in section 100.1<sup>4</sup> of the Act. The definition is broad and vagueness in this area unfortunately always invites the apprehension, (if not ultimately the reality) of abuse in those, including the news media, potentially affected by the legislation.

Section 104.5 provides for the issuing of a control order to a person where it is considered the order “would substantially assist in preventing a terrorist act” or the person “has provided training to or received training from a listed terrorist organisation”. Subsection (3) of 104.5 provides:

- (3) The obligations, prohibitions and restrictions that the court may impose on the person by the order are the following:
  - (a) a prohibition or restriction on the person being at specified areas or places;
  - (b) a prohibition or restriction on the person leaving Australia;
  - (c) a requirement that the person remain at specified premises between specified times each day, or on specified days;
  - (d) a requirement that the person wear a tracking device;
  - (e) a prohibition or restriction on the person communicating or associating with specified individuals;
  - (f) a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the internet);
  - (g) a prohibition or restriction on the person possessing or using specified articles or substances;
  - (h) a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);
  - (i) a requirement that the person report to specified persons at specified times and places;
  - (j) a requirement that the person allow himself or herself to be photographed;
  - (k) a requirement that the person allow impressions of his or her fingerprints to be taken;



- (l) a requirement that the person participate in specified counselling or education.

Breaches of a control order are subject to a penalty of five years' jail. The prohibition or restriction on communication in (3)(e) above could include members of the media. However, as with s.105.16 "prohibited contact order", it seems directed towards preventing contact with other suspected terrorist associates rather than media workers.

Division 105 of the Act provides for the issuing of preventative detention orders. Section 105.41 provides that a person being detained cannot disclose to another person that he/she is the subject of a preventative detention order. The parents, lawyer, monitor or interpreter of that person cannot disclose that fact either. If a member of the media receives information relating to a person being detained, that media person cannot disclose this information to anyone else. To do so would breach s.105.41 (6)—penalty: five years' jail.

#### *Crimes Act 1914*

Division 5 of Part 1D deals with interim orders made by magistrates in relation to forensic examinations of suspects. Publication of any proceedings under Division 5 is restricted by s.23XH. The disclosure of any information on the DNA database will breach s.23YO. An Australian Federal Police (AFP) officer can issue a notice to a suspected terrorist to have him/her produce documents and other things. It is an offence for the suspected terrorist to disclose to anybody else that a notice was issued on him/her (s.3ZQT). Penalties: one to two years' jail.

#### *Australian Security Intelligence Organisation Act 1979*

Division 3 of Part III of the Act provides for the issue of warrants to question and, where needed, to detain people (clearly including journalists) where it is reasonably believed the warrant "*will substantially assist the collection of intelligence that is important in relation to a terrorism offence*". Again, this is a broad definition, characterised by vagueness.

Section 34K limits the ability of a person detained under a warrant to contact other people while being detained (except people specifically referred to in the warrant). This constrains the flow of information to the media. S.34ZS makes it an offence for anybody to disclose information about a warrant for questioning and/or detention while the warrant is in effect and for two years afterwards. Penalty: five years' jail. In this environment any source of information even remotely connected to terrorism could see a journalist as a potential conduit to ASIO of any information provided.

As an example, Scott Parkin (the US citizen and peace activist) would no longer be able to discuss his questioning by ASIO that led to his deportation from Australia in 2005. The Federal Court has, in effect, asked ASIO to agree with Parkin's counsel on terms of discovery of the adverse security assessment on Parkin, but this is still apparently being resisted by ASIO.<sup>5</sup>

#### *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*

The Act specifies when and to whom information can be passed. It is an offence for a public official, past or present, to release information (s.121(2), s.122(2), s.127 and s.130). Penalty: two years' jail. A reporting entity (e.g. a bank) cannot give information about what it reported to anyone other than AUSTRAC (s.123). Under s.124 and s.134 the information received by AUSTRAC or reports created by it are not admissible in court which, in turn, means the media cannot access the information from court records.

#### *National Security Information (Criminal and Civil Proceedings) Act 2004*

The Act deals with disclosure of information during court proceedings likely to prejudice national security (defined in s.17 as “*likely to prejudice national security if there is a real and not merely a remote, possibility that the disclosure will prejudice national security*”). If the prosecution or defence thinks a witness will reveal such information at a hearing, the prosecution or defence must notify the court, and the court will hold a closed hearing (s.25). The Attorney-General must be notified if it is thought criminal proceedings will lead to the disclosure of information sensitive to national security. The Attorney-General can issue a certificate preventing disclosure of the information by relevant people or can issue a certificate preventing a witness from giving evidence. The Act also contains similar provisions for civil proceedings.

In the case of the major anti-terrorist raids in Melbourne and Sydney in November 2005 that resulted in the arrests of associates of the cleric Abdul Nacer Benbrika (see case below), several politicians and police commissioners, including the NSW Police Minister, Carl Scully, gave press statements on the arrests. Police released both video and pictures of the raids. Yet when the accused finally appeared in court, the DPP tried to suppress the fact sheet accompanying the charges, invoking a request from the Police Commissioner. The magistrate granted the order when the DPP announced it would go to a higher court to enforce the order. This led to the media lodging an appeal against it and the DPP withdrew.<sup>6</sup>

Several journalists complained about the difficulties in reporting the terrorism cases of Dr Mohamed Haneef, Jack Thomas (see below), David Hicks and Sheik Al-Hilaly. Uncertainty meant there was too often a need to seek legal advice about what could be reported in the newly restricted environment. There was often no information on why a particular case had reached arrest level.

One police reporter summed up the position: “Only propaganda that authorities release can ever be reported or sought.”

#### *Telecommunications (Interception and Access) Act 1979*

This Act (the TIA Act) was substantially amended by the *TIA Amendment Bill 2007* (dubbed the “track and tap” Bill) which passed on 20 September 2007—the Senate’s last sitting day before the calling of the 2007 federal election. The consolidated *TIA Act* would now appear to allow telecommunications to be intercepted on a near real-time basis without a warrant and without any credibly independent safeguards. The implication for journalists is that their capacity for any confidential telecommunication with a source can be compromised. Not only is the substance of any telecommunication potentially available to agencies such as ASIO and the AFP,

but also the location of both the journalist and the source during the time of the contact. Significantly, an attempt in the Senate to amend the Bill to require warrants for interceptions as some deterrence to overuse or outright abuse of these new powers, was defeated.<sup>7</sup> As a result, a consequential proposal for a Public Interest Monitor (similar to that established in the *Police Powers and Responsibilities Act 2000* (Qld) in relation to listening device warrants) was not pressed.

*Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007*

This Act amended the *Classification (Publications, Films and Computer Games) Act 1995* to require that publications, films or computer games which advocate the doing of a terrorist act must be classified RC (refused classification) by the Classification Board established by the Act. This, in effect, represents a censorship ban on such items by classifying them as “prohibited material”. The relevant section 9A of the Act provides:

- (1) A [publication](#), [film](#) or computer game that advocates the doing of a [terrorist act](#) must be [classified](#) RC.
- (2) Subject to subsection (3), for the purposes of this section, a [publication](#), [film](#) or computer game *advocates* the doing of a [terrorist act](#) if:
  - (a) it directly or indirectly counsels or urges the doing of a [terrorist act](#); or
  - (b) it directly or indirectly provides instruction on the doing of a [terrorist act](#); or
  - (c) it directly praises the doing of a [terrorist act](#) in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of [section 7.3](#) of the [Criminal Code](#)) that the person might suffer) to engage in a [terrorist act](#).
- (3) A [publication](#), [film](#) or computer game does not advocate the doing of a [terrorist act](#) if it depicts or describes a [terrorist act](#), but the depiction or description could reasonably be considered to be done merely as part of public discussion or debate or as entertainment or satire.

The obvious problems with section 9A relate to the vagueness of the phrases “indirectly counsels or urges” and “indirectly provides instruction” and to the uncertainty inherent in the requirement to assess the effect the classifiable item may have on a child or adult afflicted with mental impairment of any kind or severity.

Following clearance by the AFP, the DPP and the Classification Board, of eight books seized from Muslim bookshops, the federal Attorney-General in July 2006 referred the books to the Classification Review Board. It refused classification of two books on the basis that they promoted “jihad” and incited terrorism. The other six were given unrestricted classification. These were the first two books banned in Australia since 1973.<sup>8</sup>

Once tried in relation to terrorism, the urge to ban can spill into other areas. In January 2007, after approval of Dr Phillip Nitschke’s euthanasia manual *The Peaceful Pill Handbook*, the Attorney-General referred it to the Classification Review Board. This resulted in the book being banned at the end of February 2007.<sup>9</sup>

### 7.3. The re-invigoration of sedition law

The last prosecution for sedition in Australia was in 1960 when Brian Cooper was sentenced to two months' jail with hard labour for urging the natives of Papua New Guinea to demand independence from Australia. This followed the two previous cases, both in NSW—an unsuccessful prosecution in 1953 and the sentencing in 1950 of William Burns to six months' jail for writing seditious articles.<sup>10</sup>

The *Anti-Terrorism Act (No. 2)* 2005 repealed most of the existing sedition provisions of the *Crimes Act* 1914 and replaced them with new provisions in the *Criminal Code Act* 1995 being sections 80.2–80.6. Section 80.2 creates offences under the five headings of:

- 80.2(1) *Urging the overthrow of the Constitution or Government*
- (3) *Urging interference in Parliamentary elections*
- (5) *Urging violence in the community*
- (7) *Urging a person to assist the enemy*
- (8) *Urging a person to assist those engaged in armed hostilities*

“Recklessness” (as defined in the Act) applies to the element of the offence under each of the first three headings above.

These new provisions have been widely criticised, especially in submissions to the Australian Law Reform Commission (ALRC) review in 2006 of the provisions. Dr Ben Saul of the Gilbert+Tobin Centre of Public Law at UNSW submitted that there was no case for “modernising” sedition law because of a history of:

*...its manipulative use against legitimate political opponents such as Irish rebels, conscientious objectors, journalists and communists; the prosecution of trivial statements which lack any real connection to violence; its propensity to unjustifiably interfere with freedom of expression and opinion; its historically vague, uncertain and unpredictable scope and mental elements; its origins in protecting monarchical reputation (rather than any genuinely important public interest in preserving political authority and institutions from violence); its modern redundancy in light of numerous overlapping (but more precisely framed) offences; its disuse over many decades; and widespread public unease about – and considerable ridicule of – sedition offences.*<sup>11</sup>

The principal problems with the provisions have been identified as:<sup>12</sup>

- the imprecision of the key verb “to urge”;
- it is no longer necessary to prove an intention to promote ill-will and hostility to establish seditious intent—it will be enough in some cases that a person did an act which might promote those feelings if the person acted recklessly and the result followed;
- there is no requirement that the person “urging” have any particular intention, such as the previous *Crimes Act* intention to cause violence, or create public disorder or disturbance;
- in (5) violence need not be violence incited within the Australian community—it would suffice that the urging occurred to a group of a different nationality or

political opinion to use force against any other person in any other place, the effect of which would “threaten” the peace of the Commonwealth. “Threaten” is defined, inter alia, “to be a menace or source of danger” to something;

- in (8) the urging need only be to engage in conduct that provides assistance to a (vaguely defined) organisation engaged in armed hostilities against the Australian Defence Force. This could extend to verbal support for insurgent groups who might encounter the ADF in their country;
- inciting terrorism is unlawful under pre-existing law. This indicates these provisions will extend to the even murkier concept of “indirect urging” as well as condoning or justifying terrorism or conduct associated with it or even abstract opinions about that conduct;
- section 80.4 extends the geographical reach of the provisions via the *Criminal Code* so any “offence will be committed whether or not the conduct or the result of the conduct constituting the offence occurs in Australia”. It covers any person of any citizenship or residence. There is no foreign law defence. It in effect creates a universal jurisdiction.

Section 80.3 provides a limited defence for certain acts done in good faith. A late amendment to this section added that the offences created in 80.2 will not apply to a person who:

*80.3(1)(f) publishes in good faith a report or commentary about a matter of public interest.*

*Note: A defendant bears an evidential burden in relation to the matter in subsection (1).*

While this addition provides some small comfort to journalists and publishers, they still bear the onus of proof in mounting a defence in which uncertainties concerning the wider context of publication are likely to weigh heavily. In the end this addition may do little to ameliorate the overall “chilling effect” this legislation will have on news media and others.

Reference has been made above to the ALRC review commissioned on 1 March 2006 pursuant to a promise by the Attorney-General at the time of the passage of the *Anti-Terrorism Act (No. 2) 2005*. The ALRC report *Fighting Words: A Review of Sedition Laws in Australia* was issued on 31 July 2006. This was a most curious exercise in that it reversed the normal procedure where the government commissions an ALRC review before legislation in the area of review is introduced, let alone passed. The 27 recommendations in *Fighting Words* proposed substantial amendments to the sedition legislation including:

- removal of the term sedition from federal criminal law
- repealing old *Crimes Act* 1914 offences concerning unlawful associations
- making clear there must be an element of intention in urging the use of force or violence and intention that force or violence occur
- treason offences should be amended by removing the words “by any means whatever” and that conduct must “materially” assist an enemy—mere rhetoric or expressions of dissent are not sufficient
- strengthening the defence in section 80.2 by requiring consideration of the context of the conduct to include genuine academic, artistic, scientific or any

- other genuine purpose in the public interest; in connection with an industrial dispute; or in the dissemination of news or current affairs
- section 80(1) only apply to a person who, at the time of the alleged offence, is an Australian citizen or resident.

The government has ignored all the ALRC recommendations.

#### **7.4. Prosecutions using anti-terrorism laws**

The cases below show how anti-terrorism legislation diminishes principles of open justice through closing courts, denying prosecution material to defendants, attempting to deny defendants their choice of counsel and the production of confidential judgments.

##### 1. Faheem Khalid Lodhi

Lodhi was charged with intentionally doing an act in preparation for a terrorist act and possession of documents containing information knowingly connected with preparation for a terrorist act. The terrorist acts were the bombing of the electricity supply system and of Australian defence establishments. He was convicted and sentenced to 20 years' jail. During his NSW Supreme Court trial, the judge closed the court during the evidence from ASIO witnesses and suppressed publication of certain other evidence pursuant to the *National Security Information (Criminal and Civil Proceedings) Act* 2004. There were two challenges to this course of action. The first, brought by media representatives, was heard by the trial judge, Justice Whealy.<sup>13</sup> He did not accept that the Act was unconstitutional in relation to the implied right of freedom of communication. The second, brought by Lodhi, was heard by the Court of Criminal Appeal,<sup>14</sup> which held the trial judge had acted correctly in relation to his suppression decisions.

In another appeal by Lodhi to the Court of Criminal Appeal<sup>15</sup> related to retrospectivity of the charges, certain paragraphs of the judgment relating to the crown's case were suppressed by order of the court.

##### 2. Belal Saadallah Khazaal

Khazaal has been charged with one count of making a document connected with terrorism and one of inciting another person to commit a terrorist act. His trial was due to start in November 2007.

The case has already given rise to three NSW Supreme Court actions, the first<sup>16</sup> unsuccessfully seeking the revocation of bail. The second<sup>17</sup> arose from the apparently inadvertent provision for inspection at the court registry by Khazaal's solicitor and junior counsel of the AFP warrant affidavit that led to the search of Khazaal's premises. The crown sought to permanently restrain Khazaal's two lawyers from acting for their client due to their knowledge of the affidavit and from using in any way the material in the affidavit. In this preliminary case certain orders were sought to restrain the lawyers. These were denied, although Justice Whealy said some of the material in the affidavit "simply should not be disclosed at all, if it is at all possible to avoid that situation".<sup>18</sup>

The third<sup>19</sup> was in effect the substantive hearing of the motion to permanently restrain the two lawyers from acting. Justice Whealy dismissed the motion, but in doing so said the affidavit material required protection but in view of undertakings, orders were not required. In relation to the closed court part of the hearing of the case, he issued a confidential judgment.

### 3. Abdul Nacer Benbrika and Others

The first case<sup>20</sup> was a preliminary hearing before the trial of terrorism offences against Benbrika and 12 others. It involved a ruling about orders prohibiting disclosure of information and evidence to be provided at trial. Although an agreement as to those orders had been very largely thrashed out between the prosecution and defence, the major media organisations applied to have the judge not confirm the agreed orders to be made under the *National Security Information (Criminal and Civil Proceedings) Act* 2004. They argued s.22 of the Act did not authorise the court to make *in camera* and non-publication orders. The application failed. Justice Bongiorno followed *Lodhi* (NSWCCA [2006] 101) and said it was not necessary to determine whether the Act allowed the orders as they could also be made under the *Crimes Act* 1914 and the *Criminal Code Act* 1995. As the importance of the matters raised outweighed principles of open justice he made the orders, but he said the court “will maintain its vigilance to ensure they are never unreasonably or unnecessarily applied”.<sup>21</sup>

Unfortunately there is no guarantee that the same level of vigilance (available within the severe constraints of the Act) will be applied by other judges, magistrates and, for instance in relation to passport cases, by Administrative Appeals Tribunal members.

The second preliminary case<sup>22</sup> considered a defence application concerned with the inspection by some of the accused of a document (a record of interview) in the possession of the Chief Commissioner of the Victoria Police. The Chief Commissioner objected to such inspection on the ground that the document was the subject of public interest immunity. Justice Bongiorno decided not to grant the application at present but not to make a final ruling until the defence case and the relevance, if any, of the document to the defence became clearer at trial. He said:

*Distasteful as the idea of confidential evidence and submissions are to any court in our system of justice there are occasions where the open enunciation of the reason for claiming immunity will itself destroy or significantly impair the interest which is sought to be protected. And, of course, that circumstance cannot be discussed openly for the same reason. I decided that it was appropriate that the affidavit be at least examined on a confidential basis before proceeding further.*

*Having read the affidavit of Detective Sergeant Demarte and its exhibit [the subject document] I was firmly of the view that the affidavit should remain confidential and that I should hear confidential submissions from Mr Dennis [the Chief Commissioner’s counsel]. Having done so I am satisfied that a case of public interest immunity in respect of the information in the subject document is clearly raised. It is sufficient to say that to have disclosed the contents of the affidavit or required the submissions of Mr Dennis to be made other than in*

*camera would have been inimical to the public interest unless significant other safeguards were taken. ...*

#### 4. John Terrence Thomas

Thomas (dubbed “Jihad Jack”) was initially convicted of receiving funds from a terrorist organisation and possessing a false Australian passport. The Victorian Court of Appeal<sup>23</sup> allowed an appeal against this conviction on the ground that self-inculpatory statements made by Thomas in the course of an interview in Pakistan should have been excluded from his trial. The crown applied for a retrial on the basis of, among other things, interviews Thomas subsequently gave to an ABC journalist and an article in *The Age*. The Victorian Court of Appeal granted the retrial.<sup>24</sup>

In the meantime Thomas had been made subject of a “control order” (see above). A majority of the full High Court<sup>25</sup> then upheld the validity of Division 104 of the *Criminal Code Act 1995* under which Federal Magistrate Mowbray had made Thomas subject of the “control order” because of fears of Thomas helping with or taking part in terrorist activity and his admission of having trained with a terrorist organisation.

#### **7.5. Anti-terrorism and sedition legislation overseas**

This summary is largely based on research conducted for the audit by Mallesons Stephen Jaques (Sydney).

#### **United Kingdom**

##### **Terrorism Act 2000**

This Act came into force on 19 February 2001. It is the primary piece of anti-terrorism legislation in the UK. The Act creates a number of offences including inciting terrorist acts and providing training for terrorist purposes and outlaws proscribed terrorist groups.

##### **Definition of terrorism**

Terrorism is defined as the use or threat of action designed to influence the government or intimidate the public or to advance a political, religious or ideological cause.<sup>26</sup> Actions to which the definition applies include serious violence against a person, damage to property, actions which endanger another person’s life, create a serious risk to the health or safety of the public or is designed to seriously interfere with an electronic system.

This definition is also used in the *Anti-terrorism, Crime and Security Act 2001*, the *Prevention of Terrorism Act 2005* and the *Terrorism Act 2006*. The definition is broad and can be read to include gatherings and demonstrations which, while unlawful, would not usually be considered terrorist in nature. For example, “critical mass” bike rides (where groups of cyclists take to the roads of major cities with the aim of “reclaiming the streets”) could fall within the definition of terrorism as they are for the purpose of advancing an ideological cause and are arguably designed to intimidate a section of the public.<sup>27</sup>

##### **Main offences**



The main offences in the Act that affect freedom of expression and access to information include:

**supporting a proscribed terrorist organisation (section 12)**—it is an offence to invite support, arrange or assist in arranging meetings for a proscribed terrorist organisation or address a meeting with the purpose of supporting a proscribed organisation. Penalty: 10 years' jail;

**duty to disclose information (section 19)**—it is generally an offence not to disclose to the police a suspicion a person has about whether someone is involved with using money or property for the purpose of terrorism and that suspicion is based on information that comes to a person's attention in the course of trade, a profession, business or employment. Penalty: five years' jail.

### **Anti-terrorism, Crime and Security Act 2001**

This Act came into force on 13 December 2001. It increases police powers to investigate and prevent terrorist activity. Part 3 of the Act deals with the disclosure, collection and sharing of information for a criminal investigation, including to counter a terrorist risk.

Section 17 extends powers in existing legislation that provide for the disclosure of information to agencies involved in a criminal investigation or criminal proceedings. The provisions to which section 17 apply are set out in Schedule 4 of the Act, and generally relate to either information obtained by public authorities through regulatory compliance or operational efficiency investigations or survey information obtained in relation to their marketing-type functions.<sup>28</sup>

Section 19 is similar in effect to section 17 and applies to information held by the Commissioners of Inland Revenue and of Customs and Excise. It also allows disclosures to be made for the purpose of facilitating an intelligence agency to perform its functions.

### **Prevention of Terrorism Act 2005**

This Act came into force on 11 March 2005. The parts of the Act creating the control order regime were renewed in early 2007.<sup>29</sup>

The Act allows for a control order to be made against a suspected terrorist (whether or not a UK national) for suspected terrorist-related activity that is international or domestic. This activity includes committing, preparing or instigating a terrorist act or facilitating, assisting or encouraging any of these activities.

A control order<sup>30</sup> (similar to that in the Australian *Criminal Code Act* 1995—see above) can generally be made by the Secretary of State if suspecting on reasonable grounds that an individual has been involved with terrorism activity and they consider the order necessary to protect the public from the risk of a terrorist act.<sup>31</sup> Except in urgent situations, the permission of the court must be granted before a control order is made,<sup>32</sup> and a court order is required where the proposed control order involves a derogation of the European Convention on Human Rights.<sup>33</sup> A control order breach has a maximum penalty of five years' jail.<sup>34</sup>

## **Terrorism Act 2006**

This Act came into force on 25 July 2006. It is designed to operate alongside other UK anti-terrorism legislation and creates a number of new criminal offences as well as giving new powers to the police, intelligence agencies and courts.

### **Key terms**

As mentioned above, this Act uses the definition of terrorism in the *Terrorism Act 2000*.<sup>35</sup> The term “glorification” occurs throughout the Act and is defined broadly to include any form of praise or celebration.<sup>36</sup>

### **Main offences**

The main offences in the Act that affect freedom of expression and access to information include:

**encouragement of terrorism (section 1)**—to publish a statement where it is intended, or a person is reckless as to whether, the statement will encourage directly or indirectly some members of the public to commit, prepare or instigate an act of terrorism. Penalty: seven years’ jail;

**dissemination of terrorist publications (section 2)**—to distribute, sell, lend, give or permit access to a terrorist publication if it is done with the intention of directly or indirectly encouraging the commission, preparation or instigation of a terrorist act. A “terrorist publication” is one that directly or indirectly encourages, glorifies so as to imply others should commit, or is used in committing a terrorist act. Penalty: seven years’ jail;

**terrorist acts (section 5)**—to commit or assist another to commit a terrorist act. Penalty: life imprisonment; and

**training for terrorism (section 6)**—to, among other things, instruct or receive training with the intention that the skills imparted are used in connection with the commission or preparation of a terrorist act. Penalty: 10 years’ jail.

### **Sedition**

Sedition in the UK is a common law offence. There is some uncertainty around the precise elements of the offence,<sup>37</sup> but it is generally accepted that sedition involves:

*the publication of a speech or writing with intent to bring into hatred or contempt, or excite hostility towards, the Crown, government, Parliament, and administration of justice, or with the aim of inducing reform by unlawful means or of promoting class warfare.*<sup>38</sup>

There were very few prosecutions for sedition in the UK in the 20th century.<sup>39</sup>

## **United States of America**

The US Constitution First Amendment limits the direct constraints that can be applied to free speech in the US. The *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act* of 2001 (***Patriot Act***)<sup>40</sup> was enacted by the US Government in response to the attacks of 11 September 2001. Of particular concern to free speech advocates are sections 206 and 215,<sup>41</sup> which make amendments to the *Foreign Intelligence Surveillance Act* 1978.<sup>42</sup> These amendments are:

**Patriot Act s.206** allows electronic surveillance to be conducted secretly, where the person under surveillance may hinder the identification of a person of interest in an investigation;<sup>43</sup>

**Patriot Act s.215** requires that, where an application is made by the Federal Bureau of Investigation, a judge may issue an order for the production of any tangible thing for an investigation into international terrorism. The provision contains an extremely relaxed standard, which does not require any actual proof, or even reasonable suspicion of terrorist activity.<sup>44</sup> In addition, people the subject of such an order are not permitted to disclose any details or even the existence of the application.<sup>45</sup>

### **Sedition**

The US has a crime of seditious conspiracy. To be found guilty, the crime must be carried out by two or more people together. This legislation is also more concerned with the use of force than other jurisdictions.

The *Crimes and Criminal Procedure Act* of the United States, Part I (Crimes), Chapter 115 paragraph 2384 defines the offence of seditious conspiracy. It provides that where two or more people conspire to:

- overthrow or destroy by force the Government of the United States;
- levy war against the United States;
- oppose by force the authority of the United States;
- by force, prevent, hinder or delay the execution of any law of the United States;
- or
- by force, unlawfully take any property of the United States,

those persons shall each be liable for a fine, or a maximum of 20 years' imprisonment.<sup>46</sup>

## **Canada**

### **Anti-terrorism Act 2001**

Similar to the *Patriot Act*, the Canadian *Anti-terrorism Act*<sup>47</sup> amends existing legislation to permit the government to more easily combat terrorism. Amendments which directly affect access to information include:

**Access to Information Act:** The *Anti-terrorism Act* amends the *Access to Information Act* so the Attorney-General can issue a certificate to prohibit indefinitely the release of information to Canadians. Previously, where the government withheld sensitive information, the decision to withhold would be subject to review by an independent commissioner. This safeguard has been removed.<sup>48</sup>

**Criminal Code:** The *Criminal Code of Canada* is amended so that the Solicitor-General is given the power, in broad circumstances, to establish a list of terrorist entities. Judicial review is available to entities placed on this list, but the judge reviewing such an application will keep the information on which the Solicitor-General applies secret (not even the entity being placed on the list is allowed to see the information).<sup>49</sup>

### **Sedition**

The *Criminal Code of Canada* provides for general sedition offences tempered by an equally general exception to those offences.

#### **The offence**

The offence of sedition is set out in sections 59 and 61 of the *Criminal Code of Canada*, which provide for three separate acts which constitute seditious offences:

**speaking seditious words** (words which teach or advocate the unlawful use of force as a means of accomplishing governmental change within Canada);

**publishing seditious libel** (publishing a libel which teaches or advocates the unlawful use of force as a means of accomplishing governmental change within Canada); and

**is a party to a seditious conspiracy** (an agreement between two parties to teach or advocate the unlawful use of force as a means of accomplishing governmental change within Canada).<sup>50</sup>

The maximum penalty for a seditious offence is 14 years' jail<sup>51</sup>.

#### **The exception**

A person will not be guilty of a seditious offence if they can show that they intended, in good faith, to:

- show that the crown has been misled or mistaken in its measures;
- point out errors or defects in the government, constitution, parliament or administration of justice in Canada;
- procure, by lawful means, the alteration of any matter of government in Canada;
- or
- point out (for the purpose of removal) matters that produce hostility between different classes of people in Canada.<sup>52</sup>

## **New Zealand**

### **Terrorism Suppression Act 2002**

This Act, which came into force on 17 October 2002, is the main item of anti-terrorism legislation in NZ. A Bill is before Parliament to amend it.<sup>53</sup>

#### **Terrorist act**

A terrorist act is defined as an act which, among other things, is intended to cause death or serious bodily injury to one or more people, serious damage to property or the environment if likely to cause serious bodily injury, is a serious risk to the health or safety of the public, or cause a serious interference with an infrastructure facility if likely to endanger human life. The terrorist act must be done with the intention of inducing terror in the civilian population or unduly compelling or forcing a government or international organisation to do an act.<sup>54</sup> Carrying out a terrorist act includes planning, credibly threatening and attempting to carry out the act.<sup>55</sup>

The Act also provides that if a person engages in any protest, advocacy, or dissent this alone is not enough to show that the person has an intent to commit a terrorist act or to cause the intended consequences required for a terrorist act.<sup>56</sup> Committing a terrorist act is not currently separate offence. However, this will change if the 2007 Amendment Bill is passed.<sup>57</sup>

#### **Main offences**

The main offences in the Act which could affect freedom of expression and access to information are:

**recruiting members to and participating in a terrorist group (sections 13 and 14)**—to participate in or recruit members to a terrorist group if one knows the group has carried out a terrorist act or has been designated a terrorist entity under the Act. Penalty: 14 years' jail; and

**disclosing information (section 43)**—if a financial institution or another person is in possession of or has an interest in someone's real or personal property and that person or institution suspects that the property is controlled by a terrorist organisation, then that institution or person is required to report that suspicion to the police. Penalty for breach: one year's jail.

#### **Sedition**

Sedition offences are set out in Part 5 of the *Crimes Act* 1961. The NZ Parliament is considering the *Crimes (Repeal of Seditious Offences) Amendment Bill* 2007 which will repeal these offences.<sup>58</sup>

At 1 August 2007, most seditious offences required a person to have a seditious intention which includes an intention to bring into hatred or contempt, or to excite disaffection against the Queen of England, the NZ government or the administration of justice, or an intention to incite, procure or encourage the commission of any offence that is prejudicial to the public safety or to the maintenance of public order.<sup>59</sup>

Seditious offences include:

**seditious conspiracy (section 82)**—an agreement between two or more people to execute any seditious intention;

**seditious statements (section 83)**—making, publishing, causing or permitting the publication of a seditious statement;

**publication of seditious documents (section 84)**—printing, selling, publishing, distributing or delivering a publication which expresses a seditious intention; and

**use of apparatus for making seditious documents or statements (section 85)**—possessing a printing press or any other apparatus which can be used to publish or facilitate the publication of a document or statement that has or will express a seditious intention. Penalty for each of these four offences: two years' jail.

**Crimes (Repeal of Seditious Offences) Amendment Bill 2007** This Bill was drafted following a recommendation by the NZ Law Commission that the sedition offences in the *Crimes Act* were unnecessary and should be repealed. In its final report, the Law Commission noted that:

*As long as the New Zealand sedition offences remain on the statute book there is the potential for their misuse against people who criticise the Government publicly... Prosecutions for incitement to commit various existing public order and other offences should adequately suffice to proscribe what are presently labelled "seditious offences", to the extent that such conduct should be a crime.<sup>60</sup>*

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<sup>1</sup> Mark Pearson, *The Journalist's Guide to Media Law* (3<sup>rd</sup> ed 2007) 314

<sup>2</sup> Library, Parliamentary (2007) Terrorism Law. Parliament of Australia. Directory of law and cases. See: [www.aph.gov.au/library/intguide/law/terrorism.htm](http://www.aph.gov.au/library/intguide/law/terrorism.htm). Accessed 16 October 2007.

<sup>3</sup> Veronica Byrne, "The New Australian Terrorism and Sedition Laws" 11 May 2006, Minter Ellison (Melbourne)

<sup>4</sup> **terrorist act** means an action or threat of action where:

(xix) (a) the action falls within subsection (2) and does not fall within subsection (3); and

(xx) (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and

(xxi) (c) the action is done or the threat is made with the intention of:

(xxii) (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or

(xxiii) (ii) intimidating the public or a section of the public.

(2) Action falls within this subsection if it:

(xxiv) (a) causes serious harm that is physical harm to a person; or

(xxv) (b) causes serious damage to property; or

(xxvi) (c) causes a person's death; or

(xxvii) (d) endangers a person's life, other than the life of the person taking the action; or

- 
- (xxviii) (e) creates a serious risk to the health or safety of the public or a section of the public; or
  - (xxix) (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
    - (i) an information system; or
    - (ii) a telecommunications system; or
    - (xxx) (iii) a financial system; or
    - (xxxi) (iv) a system used for the delivery of essential government services;
  - or
  - (xxxii) (v) a system used for, or by, an essential public utility; or
  - (xxxiii) (vi) a system used for, or by, a transport system.

(3) Action falls within this subsection if it:

- (xxxiv) (a) is advocacy, protest, dissent or industrial action; and
- (xxxv) (b) is not intended:
  - (xxxvi) (i) to cause serious harm that is physical harm to a person; or
  - (xxxvii) (ii) to cause a person's death; or
  - (xxxviii) (iii) to endanger the life of a person, other than the person taking the action; or
  - (xxxix) (iv) to create a serious risk to the health or safety of the public or a section of the public.

<sup>5</sup> Bruce Wolpe of Fairfax Media, submission to the audit of 29 June 2007

<sup>6</sup> Bruce Wolpe (above) and *Parkin v O'Sullivan* [2006] FCA 1413 and *O'Sullivan v Parkin* [2007] FCAFC 98

<sup>7</sup> Hansard (Senate) 20 September 2007 pages 227-239

<sup>8</sup> Frank Moorhouse, "The War on free speech", *The Weekend Australian*, 4 November 2006, 22

<sup>9</sup> "Suicide manual rethink" *The Weekend Australian*, 13 January November 2007, 9; Tracy Ong, "Mercy-killing drug instructions in book", *The Australian*, 1 March 2007, 3

<sup>10</sup> Library, Parliamentary (2007): Current Issues Paper "In Good Faith: Sedition Law in Australia". See <http://www.aph.gov.au/library/intguide/law/sedition.htm>. Accessed 16 October 2007.

<sup>11</sup> See [http://www.gtcentre.unsw.edu.au/news/docs/ALRC\\_SeditionSubmissionApr06.pdf](http://www.gtcentre.unsw.edu.au/news/docs/ALRC_SeditionSubmissionApr06.pdf) Accessed 17 October 2007

<sup>12</sup> Bret Walker SC and Peter Roney: Memorandum of Advice to the Australian Broadcasting Corporation, 24 October 2005 see <http://abc.net.au/mediawatch/img/2005/ep34/advice.pdf> Accessed 17 October 2007

<sup>13</sup> *R v Lodhi* [2006] NSWSC 571

<sup>14</sup> *Lodhi v R* [2006] NSWCCA 101

<sup>15</sup> *Lodhi v R* [2006] NSWCCA 121

<sup>16</sup> *R v Khazal* [2004] NSWSC 548 N.B. The casename misspells what should be "Khazaal"

<sup>17</sup> *R v Khazaal* [2004] NSWSC 1061

<sup>18</sup> *R v Khazaal* [2004] NSWSC 1061 judgment at para. 37

<sup>19</sup> *R v Khazaal* [2004] NSWSC 1353

<sup>20</sup> *R v Benbrika & Ors* (Ruling 1) [2007] VSC 141

<sup>21</sup> *R v Benbrika & Ors* (Ruling 1) [2007] VSC 141 judgment at para. 18

<sup>22</sup> *R v Benbrika & Ors* (Ruling 3) [2007] VSC 283

<sup>23</sup> *R v Thomas* [2006] VSCA 165

<sup>24</sup> *R v Thomas* [2006] VSCA 300

<sup>25</sup> *Thomas v Mowbray* [2007] HCA 33

<sup>26</sup> Section 1

<sup>27</sup> Article 19, *The Impact of UK Anti-Terror Laws on Freedom of Expression* (April 2006) <<http://www.article19.org/pdfs/analysis/terrorism-submission-to-icj-panel.pdf>>.

<sup>28</sup> Woods E, 'The Anti-terrorism, Crime and Security Act 2001: Disclosure of Information' *House of Commons Research Paper 02/54* (4 October 2002), <<http://www.parliament.uk/commons/lib/research/rp2002/rp02-054.pdf>>, pp 32-33.

<sup>29</sup> 'UK Parliament votes to renew Control Order Regime' *counter-terrorism-law.org* (5 March 2007) <<http://www.counter-terrorism-law.org/control2007renewal1.htm>>.

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- <sup>30</sup> Section 1(4)
- <sup>31</sup> Section 2(1)
- <sup>32</sup> Section 3(1)
- <sup>33</sup> Section 1(2)
- <sup>34</sup> Section 9(4)
- <sup>35</sup> Section 20(2) *Terrorism Act 2006*
- <sup>36</sup> Section 20(2)
- <sup>37</sup> Australian Law Reform Commission, *Issues Paper 30 Review of Sedition Laws* (2006) <<http://www.austlii.edu.au/au/other/alrc/publications/issues/30/>> at [6.16].
- <sup>38</sup> Barendt E, *Freedom of Speech* (revised ed, 1996), pp 152–153 as cited in ALRC, *Issues Paper 30 Review of Sedition Laws*.
- <sup>39</sup> Barendt (above), footnote 31.
- <sup>40</sup> *Uniting and Strengthening America By Providing Appropriate Tools Required To Intercept And Obstruct Terrorism (USA PATRIOT) Act of 2001* <[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_cong\\_public\\_laws&docid=f:publ056.107.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ056.107.pdf)>
- <sup>41</sup> Kranich *The Impact of the USA PATRIOT Act on Free Expression* The Free Expression Policy Project (May 2003) <<http://www.fepproject.org/commentaries/patriotact.html>>
- <sup>42</sup> *Foreign Intelligence Surveillance Act 1978* 50 USC 1805 (c)(2)(B) <[http://www4.law.cornell.edu/uscode/html/uscode50/usc\\_sec\\_50\\_00001805----000-.html](http://www4.law.cornell.edu/uscode/html/uscode50/usc_sec_50_00001805----000-.html)>
- <sup>43</sup> *Uniting And Strengthening America By Providing Appropriate Tools Required To Intercept And Obstruct Terrorism (USA PATRIOT) Act of 2001*, section 206 <[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_cong\\_public\\_laws&docid=f:publ056.107.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ056.107.pdf)>
- <sup>44</sup> Kranich *The Impact of the USA PATRIOT Act on Free Expression* The Free Expression Policy Project (May 2003) <<http://www.fepproject.org/commentaries/patriotact.html>>
- <sup>45</sup> *Uniting And Strengthening America By Providing Appropriate Tools Required To Intercept And Obstruct Terrorism (USA PATRIOT) Act of 2001*, section 215 <[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_cong\\_public\\_laws&docid=f:publ056.107.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ056.107.pdf)>
- <sup>46</sup> The United States Code, Part I (Crimes), Chapter 115 § 2384 <[http://www4.law.cornell.edu/uscode/html/uscode18/usc\\_sec\\_18\\_00002384----000-.html](http://www4.law.cornell.edu/uscode/html/uscode18/usc_sec_18_00002384----000-.html)>
- <sup>47</sup> *Anti-terrorism Act (2001)* <[http://www2.parl.gc.ca/content/hoc/Bills/371/Government/C-36/c-36\\_4/c-36\\_4.pdf](http://www2.parl.gc.ca/content/hoc/Bills/371/Government/C-36/c-36_4/c-36_4.pdf)>
- <sup>48</sup> *Ibid* section 87.
- <sup>49</sup> *Ibid* section 83.05.
- <sup>50</sup> Criminal Code of Canada, sections 59 and 61 <<http://laws.justice.gc.ca/en/ShowFullDoc/cs/C-46///en>>
- <sup>51</sup> Criminal Code of Canada, section 61 <<http://laws.justice.gc.ca/en/ShowFullDoc/cs/C-46///en>>
- <sup>52</sup> Criminal Code of Canada, section 60 <<http://laws.justice.gc.ca/en/ShowFullDoc/cs/C-46///en>>
- <sup>53</sup> Terrorism Suppression Amendment Bill 2007. See New Zealand Parliament, *Terrorism Suppression Amendment Bill*, Website, Accessed 31 July 2007 <[http://www.parliament.nz/en-NZ/PB/Legislation/Bills/d/0/e/00DBHOH\\_BILL7813\\_1-Terrorism-Suppression-Amendment-Bill.htm](http://www.parliament.nz/en-NZ/PB/Legislation/Bills/d/0/e/00DBHOH_BILL7813_1-Terrorism-Suppression-Amendment-Bill.htm)>.
- <sup>54</sup> Section 5(1)
- <sup>55</sup> Section 25
- <sup>56</sup> Section 5(5)
- <sup>57</sup> Clause 6
- <sup>58</sup> New Zealand Parliament, *Crimes (Repeal of Seditious Offences) Amendment Bill*, Website, Accessed 1 August 2007 <[http://www.parliament.nz/en-NZ/PB/Legislation/Bills/c/f/7/00DBHOH\\_BILL7948\\_1-Crimes-Repeal-of-Seditious-Offences-Amendment-Bill.htm](http://www.parliament.nz/en-NZ/PB/Legislation/Bills/c/f/7/00DBHOH_BILL7948_1-Crimes-Repeal-of-Seditious-Offences-Amendment-Bill.htm)>.
- <sup>59</sup> Section 81
- <sup>60</sup> Law Commission *Reforming the Law of Sedition*, Report 96, (March 2007) <[http://www.lawcom.govt.nz/UploadFiles/Publications/Publication\\_128\\_352\\_R96.pdf](http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_128_352_R96.pdf)> at p 88.



## **CHAPTER 7**

### **ANTI-TERRORISM AND SEDITION**

#### **ANNEXURE A: AUSTRALIAN ANTI-TERRORISM LEGISLATION AFFECTING FREE SPEECH**

**August 2007**

##### **Commonwealth Legislative Provisions**

1. *Criminal Code Act 1995*

- S 80.2 Sedition
- S 80.3 Defence for acts done in good faith
- S 80.4 Extended geographical jurisdiction for offences
- S 80.5 Attorney-General's consent required
- S 80.6 Division not intended to exclude State or Territory law
- S 104.5 Terms of an interim control order
- S 105.16 prohibited contact order (person in relation to whom preventative detention order is already in force)
- S 105.41 Disclosure offences

2. *Crimes Act 1914*

- S 23XH Restrictions on publication
- S 23YO Disclosure of information
- S 3ZQT Offence for disclosing existence or nature of notice

3. *Australian Security Intelligence Organisation Act 1979*

- S 34K Directions by prescribed authority etc.
- S 34ZS Secrecy relating to warrants and questioning

4. *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*

- S 121 Secrecy – AUSTRAC information and AUSTRAC documents
- S 122 Secrecy – information obtained under section 49
- S 123 Offence of tipping off
- S 124 Report and information not admissible
- S 125 Access by the ATO to AUSTRAC information
- S 126 Access by designated agencies to AUSTRAC information
- S 127 Dealings with AUSTRAC information once accessed
- S 128 When AUSTRAC information can be passed on by an official of a designated agency
- S 129 Access by non-designated Commonwealth agencies to AUSTRAC information

- S 130 Dealings with AUSTRAC information once accessed
- S 131 When AUSTRAC information can be passed on by an official of a non-designated Commonwealth agency
- S 132 Communication of AUSTRAC information to a foreign country etc.
- S 133 When the Director-General of Security may communicate AUSTRAC information to a foreign intelligence agency
- S 133A When the Director-General of ASIS may communicate AUSTRAC information to a foreign intelligence agency
- S 134 use of AUSTRAC information in court or tribunal proceedings

#### 5. *National Security Information (Criminal and Civil Proceedings) Act 2004*

- S 16 Disclosure of information in permitted circumstances
- S 17 meaning of *likely to prejudice national security*
- S 24 Prosecutor and defendant must notify expected disclosure in federal criminal proceedings of information relating to or affecting national security
- S 25 Preventing witnesses from disclosing information in federal criminal proceedings by not allowing them to answer questions
- S 26 Attorney-General's criminal non-disclosure certificate
- S 27 Consequences of Attorney-General giving criminal non-disclosure certificate
- S 28 Attorney-General's criminal witness exclusion certificate
- S 38B Arrangements for civil proceedings about disclosures relating to or affecting national security
- S 38C Protection of certain information disclosed in a civil proceeding
- S 38D Parties must notify expected disclosure in civil proceedings of information relating to or affecting national security
- S 38E Preventing witnesses from disclosing information in civil proceedings by not allowing them to answer questions
- S 38F Attorney-General's civil non-disclosure certificate
- S 38G Consequences of Attorney-General giving civil non-disclosure certificate
- S38H Attorney-General's civil witness exclusion certificate
- S 40 Offence to disclose information before Attorney-General gives criminal non-disclosure certificate etc. under section 26
- S 41 Offence to disclose information before Attorney-general gives criminal witness exclusion certificate etc. under section 28
- S 42 Offence to contravene requirement to notify Attorney-General etc. under sections 24 and 25
- S 43 Offence to disclose information contrary to Attorney-General's criminal non-disclosure certificate given under section 26
- S 44 Offence to call witness contrary to Attorney-General's criminal witness exclusion certificate given under section 28
- S 45 Offence to contravene court order
- S 46 Offence to disclose information in federal criminal proceedings to certain persons without security clearance etc.

- S 46A Offence to disclose information before Attorney-General gives civil non-disclosure certificate etc. under section 38F
- S 46B Offence to disclose information before Attorney-General gives civil witness exclusion certificate etc. under section 38H
- S 46C Offence to contravene requirement to notify Attorney-General etc. under sections 38D and 38E
- S 46D Offence to disclose information contrary to Attorney-General's civil non-disclosure certificate given under section 38F
- S 46E Offence to call witness contrary to Attorney-General's civil witness exclusion certificate given under section 38H
- S 46F Offence to contravene court order
- S 46G Offence to disclose information in civil proceedings to certain persons without security clearance etc.

## Summary of state and territory legislation

The following table provides a comparison in summary form of the ways anti-terror legislation may affect free speech and access to information.

The relevant provisions are laid out in detail below.

	New South Wales	Victoria	South Australia	Western Australia	Northern Territory	Queensland	Tasmania	ACT
<b>Prohibited contact during preventative detention</b>	<i>Terrorism (Police Powers) Act 2002, ss26N, 26ZD-ZI</i>	<i>Terrorism (Community Protection) Act 2003 ss13ZC, 13L, 13M</i>	<i>Terrorism (Preventative Detention) Act 2005 ss34, 13, 14</i>	<i>Terrorism (Preventative Detention) Act 2006 ss17, 18, 40</i>	<i>Terrorism (Emergency Powers) Act 2003 ss21Q, 21R</i>	<i>Terrorism (Preventative Detention) Act 2005 S55</i>	<i>Terrorism (Preventative Detention) Act 2005 s31</i>	<i>Terrorism (Extraordinary Temporary Powers) Act 2006 s49</i>
While a person is detained under a preventative detention order, that person is not entitled to contact anyone, and the excepted category of persons does not include the media. This prohibition arises in the form of a restriction, or a prohibited contact order.	NB: special contact rules may apply for a person under 18 or incapable of managing own affairs who is held under preventative detention. (s26ZH)	NB: special contact rules may apply for a person under 18 or incapable of managing own affairs who is held under preventative detention. S13ZH	NB: special contact rules may apply for a person under 18 or incapable of managing own affairs who is held under preventative detention. S39	NB: special contact rules may apply for a person under 18 or incapable of managing own affairs who is held under preventative detention. S45	NB: special contact rules may apply for a person under 18 or incapable of managing own affairs who is held under preventative detention. S21ZL	NB: special contact rules may apply for a person under 18 or incapable of managing own affairs who is held under preventative detention. S60	NB: special contact rules may apply for a person under 18 or incapable of managing own affairs who is held under preventative detention. S36	

	New South Wales	Victoria	South Australia	Western Australia	Northern Territory	Queensland	Tasmania	ACT
<b>Prohibited contact during preventative detention</b>	<p>An eligible judge may restrict communication by granting a listening device warrant under the Listening Devices Act 1984. The warrant itself can use code names, such that even if information is released or accessed, it may not contain the true identity of the person who is subject of the warrant: s19</p>							

	New South Wales	Victoria	South Australia	Western Australia	Northern Territory	Queensland	Tasmania	ACT
<b>Restricted access to information about the preventative detention, and the period of detention.</b>		<i>Terrorism (Community Protection) Act s13ZJ</i>	<i>Terrorism (Preventativ e Detention) Act 2005 s41</i>	<i>Terrorism (Preventativ e Detention) Act 2006 s46</i>	<i>Terrorism (Emergency Powers) Act 2003 s21ZO</i>	<i>Terrorism (Preventativ e Detention) Act 2005 ss64,65,66,6 7,68</i>	<i>Terrorism (Preventative Detention) Act 2005 s38</i>	

It is an offence for a person detained under a preventative detention order, or their lawyer, parent/guardian, interpreter or “monitor”, to intentionally disclose to another person the fact that a detention order has been made or the period of detention while the order is in force. This affects the media’s access to information that a person has been preventatively detained.

	New South Wales	Victoria	South Australia	Western Australia	Northern Territory	Queensland	Tasmania	ACT
<b>Restrictions on the dissemination of information about the preventative detention and the period of detention.</b>		<i>Terrorism (Community Protection) Act s13ZJ(9)</i>	<i>Terrorism (Preventative Detention) Act 2005 s41(6)</i>	<i>Terrorism (Preventative Detention) Act 2006 s46(8)</i>	<i>Terrorism (Emergency Powers) Act 2003 s21ZO(8)</i>	<i>Terrorism (Preventative Detention) Act 2005 s67</i>	<i>Terrorism (Preventative Detention) Act 2005 s38(6)</i>	

If the “disclosure recipient”, for example the media, accesses the information, it is an offence for that person to disclose to another person information about the preventative detention order or the period of detention involved.

	New South Wales	Victoria	South Australia	Western Australia	Northern Territory	Queensland	Tasmania	ACT
<b>Special power to cordon target area.</b>	Terrorism (Police Powers) Act 2002	<i>Terrorism (Community Protection) Act</i> 2003	<i>Terrorism (Police Powers) Act</i> 2005 s12(1)	<i>Terrorism (Extraordin ary Powers) Act</i> 2005	<i>Terrorism (Emergency Powers) Act</i> 2003 ss22A, 23, 30(3)		<i>Terrorism (Preventative Detention) Act</i> 2005 s21 (1)	<i>Terrorism (Extraordi nary Temporary Powers) Act</i> 2006 s84
Police may cordon off, or restrict movement within, an area.	ss21,19A	s21T		NB: s11 also allows a police officer to order a person to leave, or to remove a vehicle from a targeted area.				



	New South Wales	Victoria	South Australia	Western Australia	Northern Territory	Queensland	Tasmania	ACT
<b>General use of force to exercise powers.</b>	Terrorism (Police Powers) Act 2002 ss21, 22	<i>Terrorism (Community Protection) Act</i> 2003 s21V	<i>Terrorism (Police Powers) Act</i> 2005 s16	<i>Terrorism (Extraordin ary Powers)</i> Act 2005 Item 3, Sch 1	<i>Terrorism (Emergency Powers) Act</i> 2003 s28			<i>Terrorism (Extraordi nary Temporary Powers) Act</i> 2006 s86(1)
Police may use reasonably necessary force to exercise powers.								
This potentially includes using force to prevent a person from obstructing or hindering a police officer from searching a person, vehicle or premises.								

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## **CHAPTER 8**

### **THE JUSTICE SYSTEM**

#### **EXECUTIVE SUMMARY**

Despite its explicit acceptance by governments, the judiciary, the media and the public, the principle of open justice has been eroded over recent years.

A main contributor has been the threat of terrorism. However, limits on access by the media to court documents and information and an increase in suppression orders (particularly in the lower courts) are examples of where the principle is seen as threatened.

Journalists report not only difficulty getting access to court documents and information, but also a lack of clear guidelines on such access. They sometimes report a virtual capriciousness by some members of the judiciary and court officers when deciding whether to allow access.

There is no uniform approach to the rules of access—even within a jurisdiction. For example, the Victorian Supreme Court has a clear practice but the Magistrates' Courts do not. One Magistrate's Court may make access easier, but a court in a nearby suburb may make it extremely hard. It often depends on the attitude of the magistrate or registry staff.

In the jurisdictions with media liaison officers the system appears to work more efficiently and more predictably.

There is also lack of uniformity about rules relating to the identification of children, whether they are accused of crime, victims of crime or witnesses. Nor is there uniformity on the naming of the accused in cases involving children, which could identify the child or children involved.

Across all jurisdictions there are problems with suppression orders. Sometimes there is even difficulty in getting clear information on whether a suppression or pseudonym order has been made and the reasons and legal bases for making it.

Courts appear to be making suppression orders far more often. The scope, precision and duration of the orders is sometimes not given or not easily found out. Different practices and methods across jurisdictions for informing the media that a suppression order has been made or amended sometimes expose the media unnecessarily to an inadvertent breach of the order.

There is confusion about the standing of media organisations to appear in relation to the making of, amending of or appeal against suppression orders.

The lack of uniformity in the legislation and rules and practices in relation to both access to court information and suppression orders poses added problems for media organisations which operate across borders and creates anomalies from one jurisdiction to the next.

## CHAPTER 8

### THE JUSTICE SYSTEM

#### 8.1. The principle of open justice and the courts

*In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice....Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge, while trying, under trial. (Jeremy Bentham, 19<sup>th</sup>-century legal philosopher)*

The notion of open justice can be traced back to the early history of English courts. It emanates from a view that justice conducted behind closed doors may give an impression that something improper is happening. The principle has continued into modern times and the reporting of cases is seen as a means of promoting public confidence in the judicial system and the administration of justice. However, there are many criticisms that the principle is compromised by an increasing tendency to issue suppression orders, close courts for some evidence and make it difficult for non-parties to litigation to get access to court documents, to use three examples. There is also the spectre of the possibility of contempt of court facing journalists in their coverage of court proceedings.

The media play an important role in the information that the public gets about court proceedings. We think it is fair to say that it is generally accepted that the media should be free to report what goes on in court because, as a rule, the public has neither the time nor the inclination to sit in court. This is, of course, subject to a number of exceptions and the responsibility of the media to report accurately and fairly.

In a paper to the “Courts and the Media” conference at Melbourne University in July 2007, Justice P.D. Cummins of the Supreme Court of Victoria said:

*The window to the courts is the media. Accurate, fair and balanced reporting of legal proceedings is of great benefit to society. It brings the functioning of the courts to the community.*

That is not to say that his Honour had no criticism of the way the media report cases, in particular sentencing of offenders. He said that headlines, in trying to attract attention to what is generally a fair story, are sometimes “... *exercises in vilification and punitiveness*”. He also criticises some editorial and opinion writing, saying that the journalists often concentrate on personalities rather than issues and consequences rather than causes.

In NSWLRC 2000, the generally accepted public benefits of the principle of open justice are summarised:

*... the public, including the media, should be able to attend court hearings, in addition to the parties. In this way, court proceedings are exposed to public and professional scrutiny and criticism. This tends to reduce the chance of abuse, maintain confidence in the integrity and independence of the courts, and distinguish judicial from administrative processes. Other arguments that have been used to support the public administration of justice include: that openness may improve the quality of evidence; that it may induce unknown witnesses to come forward and cause trial participants to perform their duties more conscientiously; that it has a “therapeutic” value to the community in that it provides an outlet for concern, hostility and emotion engendered by serious crime; that it provides a form of community legal education; and that the knowledge gained by members of the public may have a deterrent effect on those who may otherwise break the law.<sup>1</sup>*

In *Idoport*,<sup>2</sup> Justice Einstein outlined six limitations to the principle of open justice in cases involving:

- Trade secrets, secret documents or communications
- Blackmail
- The need to maintain order in the court
- National security
- Some administrative action which may be better dealt with in chambers
- The court as a guardian of wards of the state or mentally ill patients.<sup>3</sup>

There are also some statutory proscriptions for reporting such things as children’s identities and victims of sexual assault, which vary between each state and territory. These restrictions are dealt with below.

In the absence of statutory departures from the principle of open justice, the courts have narrowly interpreted exceptions to the principle. For example, it is unjustified on the grounds that the evidence might be unsavoury or may offend public decency or morality;<sup>4</sup> may cause embarrassment, distress, ridicule or invasion of privacy of the victim, a party or a witness; or it may cause damage to the reputation or business affairs of a person.<sup>5</sup>

In an Australian Press Council public address on 22 March 2007, the Chief Justice of Western Australia, the Hon Wayne Martin, observed that accountability of the courts, public confidence in the judicial system and processes and independence of the judiciary are important aspects of the public interest that are served by the principle of open justice. The media are the means by which the public gets information about the workings of the courts.<sup>6</sup>

Over the years there has been a greater reliance on documentary evidence in court cases. Affidavits and statements of witnesses are used to present evidence in chief and are not generally read in open court. Submissions and arguments are often made in writing with legal representatives only asked to expand on certain arguments orally. Cross-examination of witnesses is often the only oral evidence presented. This is in

part a result of the increasing complexity of trials, particularly large commercial matters. It leaves observers, including journalists, with an incomplete picture of the evidence. This in turn may lead to inaccurate or unfair reporting of the evidence.

Media access to the courts relies on:

- Hearings held in open court or permission for the media to be present.
- Reasonable and timely access to court documents (with some exceptions) to enable accurate reporting of evidence.
- The reasonable and consistent judicial use of discretionary powers to suppress evidence and/or documents.

A lot of the legal research on access to court documents and restrictions on reporting has been conducted for the audit by Blake Dawson Waldron (Sydney).

We do not deal in this chapter with restrictions imposed on access to information and reporting by operation of the raft of anti-terrorism laws. These are dealt with in chapter 7.

## **8.2. Access to court and court documents**

Tim Dick<sup>7</sup> talks about the need for journalists to be able to accurately report court proceedings. He and other journalists surveyed by us refer to the difficulty of getting access to documents. The ease by which someone can get the documents—be they statements of claim, exhibits, affidavits or transcripts—varies across jurisdictions and courts. Dick refers to the greater reliance on written documents rather than oral evidence in the modern courtroom. He says everyone except journalists are reading them at the time evidence is being given.

*There should be a clear, open and uniform approach from all courts. Open justice means more than opening the courtroom door. It means ensuring anyone can know what is going on in a courtroom, and so journalists can inform others what happened, and to whom.*

This view is shared by the Chief Justice of Western Australia, Wayne Martin, who also observed that

*... the only proper limitations upon full and unconstrained media access to the justice system are those necessitated by the need to ensure a just process, so that the only justifiable restrictions are those deriving from an adverse impact upon justice.*<sup>8</sup>

Media access to court documents varies across the jurisdictions as do the procedures to be followed in obtaining that access.

The position in NSW is relatively restrictive (compared for instance to the Federal Court) and subject to an interaction of legislation and court practice notes that embody often wide discretions with the capacity to promote confusion and uncertainty.

In NSW there are a variety of specific exclusions from access to documents or parts thereof in cases relating to the identity of protected witnesses, sexual assault, minors, closed court proceedings, Apprehended Violence Orders etc. The principal legislation, rules and practice notes concerning access generally comprise:

- section 314 of the *Criminal Procedure Act 1986* providing the media with access to certain court records, at any time from the commencement of a proceeding until two working days after its final disposal, for the purpose of providing a fair report for publication. Access will be subject to any restrictions ordered by the court.
- *Supreme Court Practice Note SC Gen 2*: relates to access to court documents by non-parties who in all cases must obtain leave from the court. Subject to any orders of the court access will generally be granted to pleadings and judgments in concluded proceedings; documents that record what was said or done in open court; material admitted to evidence and information that would have been heard or seen in open court. Access to other material may only be granted on the establishment of exceptional circumstances.
- *District Court Practice Note (Civil) 11*: allows for non-party access in similar terms to the above Supreme Court Practice Note.
- *Uniform Civil Procedure Rules 2005*: these apply to the Supreme, District and Local Courts. Rule 36.15 allows any person on payment of a fee to obtain a copy of a judgment or order unless the court has ordered otherwise. Copies of pleadings or other documents may be released if the registrar forms the view that the non-party appears to have sufficient interest in the proceedings.

*Local Courts (Criminal and Application Procedure) Rule 2003*: clause 62 relates to criminal proceedings and general applications under Part 5 of the *Local Courts Act 1982*. A magistrate or registrar may provide a copy of transcripts to third party if of the opinion that party “has a proper interest for doing so”.

Annexure A is a table showing the various rules and practices of the High Court, Supreme and District Courts in other states and territories, the AAT and the Australian Industrial Relations Commission.

In relation to access to court documents a media lawyer in South Australia comments:

- There is a statutory regime in SA which permits public and media access to court documents. Most documents are supposed to be accessible as of right. The balance of documents is accessible subject to a judge approving access.
- In practice, the courts are panic-stricken when faced with a request for access (especially by the media) and, in many cases, refuse access in the face of the clear statutory entitlements. Once challenged, they will generally refer the matter to a judge even when there is an absolute entitlement and the right to access does not require judicial approval.
- The requests, which could and should be dealt with on the spot, often take weeks to process. They are often ‘lost’ in the system.



- As there is no right of appeal or review from a refusal to grant access, many judges will simply refuse the requests rather than consider what is appropriate.
- Suppression orders are also used as a justification for refusing access.

A television journalist in Victoria provided the following comments about access to court documents in that state:

- In the Magistrates Courts, the process of journalists seeking documents is often hindered by court officials who are obsessed with privacy and, as bureaucrats, are taught to be suspicious of the media. They often take it upon themselves to black out offenders' addresses and victims' names, without being directed by a magistrate. This has led, in cases of multiple rapes, to situations where it is impossible to identify the number of victims and the number of offences relating to each victim. In these courts there are no media liaison officers, no culture of co-operation, no accurate descriptions, no return phone calls.
- In the County Courts it's often impossible to get copies of judges' sentences because they hand-write them and refuse to provide transcripts. The judges can be loath to release visual exhibits after trials finish. Cameramen and photographers are banned from standing on court property and are confined to the footpath.
- The Supreme Court is good at providing transcripts of trials on request and will often grant access to audiovisual exhibits, although sometimes lawyers are needed for such an application. The attitudes of the judges towards the media vary widely. Some are very co-operative while some remain wary. For example, when all media outlets joined in an application for permission to televise the sentence of gangland killer Carl Williams, the judge's reasons for refusing the request were based heavily on stereotypes of the media, and she showed a lack of understanding of its objectives. She thought we wanted to create a 'cult of personality' among judges, when all we really wanted was soundbites. The journalists claim the judge couldn't grasp the difference, in terms of impact, between an audiovisual grab of her delivering her sentence and a few quoted lines on a boring graphic.
- The Coroner's Court is very bureaucratic and almost impossible to deal with. For example, refusing to release a copy of a finding a coroner had just handed down in open court; and the court trying to limit the presence of the media by dictating where crews are allowed to stand.
- The Federal's Court's media liaison officer is excellent and forthcoming. The officer has a good understanding of the media's needs.

Other comments by journalists and media lawyers include:

- Access in Western Australia to court documents and video evidence is good. When we are not given access we are usually given a reasonable explanation.
- However, another WA journalist observes that there does not seem to be a set system for how and when courts release transcripts, except for sentencing comments when the judges are keen to ensure accuracy of reporting.
- Magistrates in WA are responsible for deciding if transcripts are made available and their approaches vary wildly. One magistrate, on a journalist's application for a transcript, made the journalist drive to the court to argue for access. After berating the journalist about his or her newspaper's coverage of issues in the magistrate's area, he "reluctantly" gave the transcript. Another magistrate, who granted a journalist several applications for access, noted that if the media did not report his comments to the public what was the point in enunciating them?
- A freelance journalist complained the cost of copying court documents in the Federal Court was prohibitive and would be far lower if he requested the documents under FOI .
- A business journalist from Victoria said there was never any access to exhibits and transcripts were rarely made available. He complained that the Supreme Court would not tell him anything and he had to visit the court every day for a month to get a copy of a statement of claim in one case. He said the Federal Court in Victoria was better.
- One South Australian journalist referred to the relationship between the judicial system and the media as "tenuous". The approach of the judiciary to the media varied greatly with an underlying feeling that journalists cannot be trusted to do their job, despite contempt laws. This view was also expressed also by a South Australian media lawyer.
- A court reporter noted that the DPP does not provide statements of fact and, in paper committals, no information at all is provided, leaving journalists to piece things together. This leads to inaccuracies. The provision of even limited facts would be a safer approach.
- Journalists are required in South Australia to fill out standard forms to request court documents. This is no guarantee the material will be provided. It depends on the attitude of the judge. As there is no right of appeal, that is the end of the matter.
- In over 5½ years as a court reporter, one South Australian journalist said he had watched the steady restriction on the flow of information from the courts. He said there was a belief that journalists should be bound by the rules of "fair and contemporaneous reporting of court proceedings" and therefore allowed only to repeat what has been said in a courtroom, not the documentation that goes along with the legal argument.

- In a case relating to two childcare workers where video of the assault charges was key evidence, the magistrate found all journalists or media organisations were not “any party interested therein”, and therefore there was no obligation to provide a copy of the video to journalists, even after the hearing was over.
- A journalist in Canberra said that access to documents in the High and Federal Courts is relatively easy. The ACT Supreme Court has a policy of assisting journalists but the Magistrates Courts are a “mixed bag”. Some officials are helpful; others distinctly unhelpful. The Magistrates Courts have become more bureaucratic and media unfriendly over the years. As a rule, it is not possible to obtain a transcript of ACT court proceedings without paying a significant fee. Transcription services have been outsourced. On the other hand the High Court’s transcripts are on-line and free.
- A West Australian journalist believes media are given good access to court documents and video exhibits.
- A media lawyer in Victoria says that, at the moment, in Victoria, there is no clear regime in relation to access to documents which form part of a proceeding. It is generally at the discretion of the trial judge whether documents will be made available to media outlets. Different judges have different views and attitudes in relation to this. There is also no clear definition as to when documents are said to form part of a proceeding and when they are not.

He submits that a comprehensive legislative regime should be put in place regulating access to documents used in legal proceedings. Documents should be generally available and access should only be denied where necessary—using the same regime as that used for the making of suppression orders.

Some jurisdictions have dedicated media officers but the experiences of journalists and lawyers working for media organisations vary widely.

- A crime reporter in Perth records that the state has a media officer who takes care of inquiries relating to matters in the Supreme, District and Magistrates’ courts. The officer assists in getting transcripts of sentencing and other documents and mediates with some court clerks who have used heavy-handed and intimidatory tactics towards journalists.
- A lawyer in South Australia says that media liaison officers are well-meaning but have a limited ability to streamline processes, change the inherent distrust of the media or the longstanding reluctance to embrace transparency or accountability.
- In Queensland, one journalist notes that the appointment of a media officer has been discussed from time to time but has not gone ahead because of budget priorities.

- In Victoria, television journalists note that the Supreme Court has a media liaison officer. The officer will respond to requests for information or court documents but does not inform journalists if something unexpected, such as an urgent hearing or an injunction application, is taking or is to take place.
- The Coroner's Court in Victoria has a media liaison officer, but a journalist complains that they are discouraged from approaching the officer. The journalist claims the court was upset about the number of calls it was receiving from journalists about cases in the list and instructed people not to call. As a compromise, a list was designed, for release each Friday, of the next week with limited details of the cases.
- One journalist observed that WA's media liaison officer is extremely helpful, sending out emails of transcripts and advising of new suppression orders.
- The High Court has a media officer who prepares a media release for every judgment and distributes judges' speeches.
- Neither the ACT Supreme Court nor the Magistrates Court have media liaison officers and the registrars are usually the point of contact.
- One media lawyer commented that those courts which have media liaison officers operate more effectively to enable access to court documents.
- A journalist commented that it appears not all court staff have had media training and often don't know what documents reporters are allowed to see.
- A media lawyer said that registry staff often demonstrate inconsistency about which documents and information to which they will allow journalists access.
- One journalist complained that police fact sheets go "missing" and she is forced to go to the police station to hunt them down.
- Another journalist finds some court officers generally distrusting and is given a hard time for no particular reason.

In August 2007 the Chief Justice of Queensland announced that journalists would be allowed to make an audio recording of Supreme Court criminal and civil proceedings provided they do so unobtrusively and without interruption to the proceedings.<sup>9</sup> This was seen as a means of promoting openness and transparency in the justice system. It was reported the next day in the *Sydney Morning Herald* that the Victorian County and Supreme Courts and the South Australian Supreme and District Courts allow journalists to record proceedings and that the NSW Supreme Court would consider any such approach, although there was no proposal before it at the moment. New Zealand courts allow media cameras, subject to some conditions.

In April 2006, the NSW Government published a discussion paper on access to court information and documents.<sup>10</sup> The purpose was to set out policy proposals about access and “to make proposals for change that promote greater certainty in relation to rights of access and a more consistent application of that policy”. The review noted there was little guidance on how a court or registry should exercise discretion when deciding to grant a third party access to court documents. The purpose of the review was to articulate a policy to promote greater certainty about rights of access and a consistency in the application of the policy.

The review made 22 proposals about which it invited comment. For example:

- It recommended that existing legislative provisions relating to access to criminal and civil court documents be repealed and consolidated. It proposed classification of documents as “open access” or “restricted access”. If classified as open, it would not be necessary for the court or registrar to determine the application.
- Open access documents would be made available to the media and the public and include the following:

Criminal jurisdiction:

- transcripts of evidence in open court
- statements and affidavits admitted in open court
- records of adjudication or order
- indictment or court attendance notice
- police fact sheet
- court listing and history information
- civil jurisdiction
- judgments and orders
- originating process and pleadings on concluded cases
- transcripts in open court proceedings
- statements and affidavits admitted in open court
- court listing and history information

The review set out information which should automatically attract a restricted classification, such as criminal and traffic antecedents, medical records, psychiatric reports, pre-sentence reports, pleadings, affidavits or statements which have been rejected or struck out, evidence taken in the absence of a jury, documents in support of suppression/non-publication orders and victim impact reports. Leave may be granted to obtain access to a restricted access documents with sufficient reason.

It also said parties should be entitled to file an open access document with the omission of confidential data of a personal or sensitive nature and to file a separate restricted access document with the omitted information.

Similar reviews are being or have been conducted in Victoria, New Zealand and, informally, in Western Australia.<sup>11</sup>

Certain media organisations and the Australian Press Council made submissions to the NSW and Victorian reviews. In general, those submissions promote a position of a “presumption of access”, as Rodrick describes the situation in the US.<sup>12</sup> Access to court documents will affect the capacity of the public to know and appreciate the workings of the courts.

One media lawyer said that, one criticism of the NSW provisions was that, compared to the Federal Court, access is not permitted to documents until the proceedings have been finalised. In its submission to the NSW Review, Fairfax Media (supported by Free TV Australia) noted that the Review “unaccountably” did not refer to the Federal Court and the Supreme Courts of Victoria, the ACT and Queensland in which non-parties can inspect documents without leave, an order of the court or a decision of the registrar. It said that these systems have been operating successfully and without controversy for many years. It asked “... why should NSW be subjected to a regime of access to court information which is considerably more inhibited than the[se] regimes ...”

Concern was also raised by media organisations about the *administration* of the rules of access. They refer to the need for the urgency of some applications for access and whether the policies adopted would cater for these situations. For example, some court reports are broadcast within an hour or two of a court rising or published in the press the next morning. Clearly the speed with which it can get access to documents is of concern to the media.

Major media organisations and court reporters are aware of the restrictions on what they may or may not publish. Contempt laws also act to preserve the due administration of justice.

The media generally support detailed guidance for judicial officers about access to documents through rules of court or practice notes to ensure that, where access depends on the court’s discretion whether to allow access, there is consistency in the approach. In NSW certain drawbacks of the Practice Note now operating were highlighted.

A final report in NSW has not yet been published. This audit is unaware of the status of the other reviews.

### **8.3. Restrictions on reporting and suppression orders**

#### **8.3.1. General**

In this part we examine the restrictions placed upon the media in reporting court proceedings. Those restrictions may be imposed by statute or at common law. They involve mandatory suppression of such things as information which may be capable of identifying children involved in cases, victims of sexual assault, persons before the Family Court, to name a few.

Kenyon<sup>13</sup> identifies six areas of concerns raised by commentators (including judicial officers, lawyers, the media and academics):

- The number of orders made and their apparently higher frequency in lower courts;
- The difficulty of accessing clear information about the legal basis on which an order could be made, which relates to the number of statutory provisions which can apply to the making of orders and the unclear ambit of common law powers in some situations;
- The ways in which applications are made, by whom and with what reasons being offered in support of them;
- The scope, precision and duration of orders;
- How the terms of orders (and amendments to orders) are communicated to the media;
- Standing for media organisations to appear in relation to suppression when making an order is being considered and on appeal.

Kenyon also contrasts two models of non-publication orders in Victoria and South Australia.

### **8.3.2. Statutory restrictions**

There are some statutory restrictions on reporting certain types of matters or identifying certain classes of people involved in legal proceedings.

In all states and territories, laws prohibit or restrict:

- The identification of victims of sexual assault.
- The identification of children under the age of 17 (in Queensland) or 18 (in all other jurisdictions) who are charged with a criminal offence.
- The identification of all parties to adoption and wards of the state or former wards of the state.

### **8.3.3. Children**

The extent to which children can be identified as complainants or witnesses in proceedings varies across Australian jurisdictions. Some states allow media attendance and reporting but prohibit naming the child and other details which could possibly lead to the child's identity. Some states allow identification with the court's leave. In Tasmania, the media is barred from the court in cases involving children, except with the court's permission. In the Northern Territory the restriction applies only where the court orders it.

The restrictions on identifying children can persist even when they reach adulthood or die. This has been criticised by a number of journalists as being unnecessary.

It is useful to look briefly at the statutory scheme operating in one state. In NSW, section 11 of the *Children (Criminal Proceedings) Act 1987* provides for restrictions on reporting information which may identify children involved in criminal proceedings whether as the accused, the victim or a witness. Children who were only mentioned in criminal proceedings could also not be identified. In 2002 the section was amended to protect the identity of a child even after the child had reached adulthood.

In March 2004 the Act was amended to extend the prohibition to children who were dead at the time of publication and siblings of child victims, provided both or all children were children when the offence was committed.

Richard Coleman of the Fairfax Legal Unit noted that the media in NSW had been publishing the names of dead children since 1803. He makes the following points about the amendments:

- The proceedings against Kathleen Folbigg, who was convicted in 2003 of the murder of three of her children and the manslaughter of a fourth, were widely reported. She and the children were named. The amendments mean that, in any future reporting, even though the case is over, the children's names cannot be reported and Ms Folbigg's name cannot be published because this may lead to the identification of the children.
- Any future story about the kidnapper and murderer of Graham Thorne could not name Thorne because he was a child at the time of his murder.
- In 1989, 14-year-old Leigh Leigh was murdered. Matthew Webster was convicted of her murder. Any future stories about other criminal proceedings against Webster which name Leigh Leigh would breach the section because she was a child at the time of her murder.

There are several anomalies created:

- There is no prohibition where no criminal proceedings are commenced. For example, a woman who kills her family and then herself could be named, as could her children.
- The NSW media could report the names of child murder victims in other states. The interstate media could report the names of child victims, even though the NSW media cannot.
- Stories which don't refer to ensuing criminal proceedings could name dead children.
- The name of a missing or murdered child might be published extensively before criminal proceedings are commenced. The disappearance of Samantha Knight received extensive media coverage, as did her name, for the 15 years between the time she disappeared and her abductor and killer was charged. If this amendment had been in force at the time of criminal proceedings, the media



could not have reported on those proceedings as that would have identified her or been likely to identify her.

- As the parents or guardians are often the perpetrators on children (especially young children), once the child is deceased, a prohibition on the identification of the dead child affords more protection to the accused than the victim.

Media organisations made a number of representations to the government about the “absurdity” of the amendments and the fact that the restrictions were far greater than in other states. Coleman said no response was received to these submissions. However, recently, without any consultation with the media, the government passed further amendments to section 11:

- The media will be able to name a dead child if a “senior available next of kin” consents. Before giving consent, that person must be satisfied that no other “senior available next of kin” objects. A “senior available next of kin” is a parent, a person who has parental control or the Director-General of Community Services if the child was under the department’s control at the time of its death.
- A senior available next of kin who is the accused or is convicted in the criminal proceedings cannot give or withhold permission.
- If there is a prohibition on identifying siblings, the senior available next of kin has to make reasonable inquiries of the siblings about publication and has to take their views into account before giving permission.
- If the name of a child involved in criminal proceedings had been lawfully published before the 2004 amendments, the child’s name may now be published.

Coleman notes that there will be no one from whom to seek permission if, e.g., a father is charged with killing both the child and its mother or a parent is charged with a child’s death and the other parent cannot be found. Further, if a sibling objects to publication of the child’s name, that objection merely has to be taken into account. This could lead to family disputes in which the media could become involved.<sup>14</sup>

Just recently, the NSW Attorney-General, John Hatzistergos, announced that he had referred to the Parliamentary Committee on Law and Justice a proposal that juveniles charged with serious crimes should be allowed to be named. He said there was a need to examine whether the policy objectives of the prohibition were still valid, including reducing trauma to victims, reducing the stigma for siblings of the offender and the victim and allowing for rehabilitation and reintegration of the offender after having served their sentences. He noted that in a recent gang rape case, all the accused had their identities protected because one was under 18 at the time of the crime (although 18 by the time the matter came to trial).<sup>15</sup>

#### **8.3.4. Jurors**

Most jurisdictions ban the identification of jurors. In most states, the publication of material on the deliberation of juries is prohibited and it is an offence to solicit such information.

#### **8.3.5. Family Court proceedings**

At the federal level, the *Family Law Act 1975* prohibits the identification of any party to or witness in proceedings.

#### **8.3.6. Committal and bail proceedings**

There are also certain restrictions on reporting criminal committal proceedings and bail applications. In Tasmania, reporters are prohibited from covering any bail applications. The rationale for restrictions is to avoid, at the pre-trial stage, prejudice to the accused and influence of potential jurors. As Pearson says, for example, there may be material put forward at the committal hearing which is ultimately not accepted in evidence at trial.<sup>16</sup>

#### **8.3.7. Prisoners**

There are restrictions on journalists talking to prisoners in custody without the permission of the correctional service. An editor reported that one of his senior journalists was prosecuted for doing his job:

A Queensland journalist happened to take a phone call from a female in custody. The prisoner claimed she and two other prisoners were being confined in body belts and forced to drink urine from the floor because they were so thirsty. The journalist took the matter to the Corrective Services Department and the office of the Corrective Services Minister. The journalist was never advised that he may have broken the law by interviewing the prisoner. The newspaper thought that, given the attitude of the senior people he had spoken to and the fact he had not initiated the contact with the prisoner, he was on safe ground. His report led to an internal inquiry which found prisoners had no avenue to complain, other than call the paper and procedures were introduced to enable prisoners to air grievances.

Publication of the story led to the journalist being charged for interviewing a prisoner without permission. He was photographed and finger-printed. The case took more than a year to come to trial, causing the journalist and his family a great deal of worry. At trial the magistrate dismissed the charges, accepting the defence submissions and finding the investigating officer did not have the authority to institute proceedings against the journalist, the prosecution had not proved the claim that the interview had not been conducted without authority and the prisoners' claims raised human rights issues so serious that, constitutionally, their publication overrode any legislation prohibiting it.

Corrective Services appealed. The appeal was dismissed on the basis that the investigating officer did not have the authority to start proceedings. Given the first ground of the appeal failed, it was not necessary for the judge to address the other grounds.

The Queensland Government argues that prisoners should be denied access to journalists and vice versa. Whatever the reason, the case changed little, if anything, in regard to the rights of journalists to report matters about which they believe the public has a right to know.

Annexure B is a table prepared by Blake Dawson Waldron outlining the major statutory prohibitions on publishing certain information which will or may lead to the identity of persons and/or the circumstances of legal proceedings. Pearson also provides useful tables of statutory restrictions on publication across Australia.<sup>17</sup>

#### **8.4. Suppression orders**

Courts may restrict access to or reporting of proceedings by making a non-publication order (commonly referred to as a suppression order). This is an example of an exception to the principle of open justice. A person may ask a court, (or a court may decide of its own accord), to make a non-publication order:

- to give effect to an order that proceedings be heard in camera (if the in-camera order is not of itself sufficient to imply a restrictions on publication of the proceedings in closed court);
- in combination with an order that information be concealed from those present in court; and
- where the proceedings have been conducted in open court and all relevant information has been accessible to those present in court.

However, with no express statutory power it is unclear to what extent the court has power to make an order which binds those not present in court in relation to reporting on, or publishing information about, the proceedings in question. In this way, the case law does not speak with one voice.<sup>18</sup> One argument advanced in cases where the power has been denied is that courts are conferred judicial power to determine disputes and make orders with respect to existing rights, duties and liabilities of the parties before them; a non-publication order which purportedly binds the world at large seems more an exercise of legislative power.<sup>19</sup>

In all states and territories except South Australia (where courts' powers to close courts are subject to a statutory code in substitution for any inherent powers), judicial power to close proceedings in court will usually be construed narrowly.<sup>20</sup> That is, there must be material before the court which allows it to conclude, reasonably, that the order is necessary to secure the administration of justice. In South Australia, courts' powers to close hearings are construed more broadly.<sup>21</sup>

#### **8.4.1. Superior courts – inherent powers to restrict access to or reporting of proceedings**

Superior courts have inherent powers to make pseudonym orders (i.e. suppress the name of a party to or witness in proceedings) and orders which conceal evidence from those present at an open hearing where necessary for the administration of justice.<sup>22</sup> Similarly, courts may make a non-publication order with respect to the proceedings to ensure the proper administration of justice.<sup>23</sup> Further examples of courts making orders restricting access to or the reporting of proceedings include:

- where an open hearing would destroy the very protection sought from the court;<sup>24</sup>
- where an order is required to protect a witness;<sup>25</sup>
- to ensure blackmail or extortion victims are not deterred from bringing proceedings;<sup>26</sup> and
- where a court is charged with responsibility of a child as a guardian<sup>27</sup> or of the mentally ill.

Even if the inherent power is restricted to the need to secure justice in the case at hand, there is no such restriction on the statutory powers of superior courts.<sup>28</sup> Courts with inherent powers may restrict publication of matter the subject of legal proceedings (which is distinct from closing a hearing) in order to, for instance:

- conceal evidence from those present at an open hearing (e.g. which contains confidential information);<sup>29</sup> and
- make a pseudonym order.<sup>30</sup>

The courts have disagreed on whether inherent powers cover a power to order the restriction of publication of evidence revealed in open court.<sup>31</sup>

To the extent an inherent suppression power exists, it extends only to those present in the courtroom and not to the world at large.<sup>32</sup>

In *Raybos*,<sup>33</sup> the accused, a partner at a law firm, sought a non-publication order with respect to his name on the basis of potential damage to business and personal reputation. Justice Kirby of the New South Wales Court of Appeal refused to make the order since, even if there were power to suppress publication of information disclosed in open court, non-publication orders were undesirable in criminal proceedings and it would threaten the principle of equality before the law if an accused was offered greater protection by reason of his or her profession. Justice Samuels refused to make the order since publication in that case would not prevent or seriously impede the fair resolution of the proceedings according to law.

However, increasingly, courts are not taking such a restrictive approach to non-publication orders. For instance, it has been held that an exception can be made to the principle of open justice not just to secure the administration of justice in the particular case but in cases generally, or in special circumstances (such as matters of national security). Another broad view has been that an order curtailing the open justice principle may be made whenever it can be properly assumed that unacceptable consequences would follow if it were not made. In respect of concealment orders,

courts have considered whether disclosure of the relevant person's identity would cause hardship to the person or impede the future supply of relevant information from the person to be relevant factors.

#### **8.4.2. Inferior courts and tribunals: implied powers**

Inferior courts derive their power from statute and do not have inherent powers. However inferior courts may have powers implied from their statutory powers which are required for the exercise of the statutory powers.<sup>34</sup>

However, inherent jurisdiction and jurisdiction by implication are distinct and it is doubtful the extent to which implied powers could enable an inferior court to make a suppression order. For instance, in the *Mayas* case the court found a magistrates court did not have an implied power to suppress the identity of a complainant in a sexual assault case where the relevant statute allowed the magistrate to hear proceedings in camera but contained no power to make a suppression order.

The weight of cases suggests inferior courts and statutory tribunals may only make orders restricting access to or reporting of court proceedings where there is an express statutory power to do so.<sup>35</sup>

#### **8.4.3. Circumstances in which an order may be made**

Where an order closes a hearing or prohibits publication of evidence, it must only apply to that part of the hearing or evidence which is necessary to conceal in the interests of justice.<sup>36</sup> Embarrassment or damage to reputation is not a sufficient justification for a suppression order.<sup>37</sup>

Exceptionally, prejudice and embarrassment have been considered in several cases where plaintiffs became HIV positive as a result of receiving blood transfusions, leading to pseudonym orders so as not to deter the plaintiffs from commencing proceedings.<sup>38</sup>

The court took a narrow view of the judicial power to issue a suppression order in *J v L & A Services*. A married couple commenced proceedings against their employer, alleging that they had contracted HIV in the course of employment. They sought an order that they be permitted to sue using their initials only, on the basis that they would suffer social ostracism, stress and anxiety if their names were published. They obtained the order but the defendants appealed against the order successfully. Fitzgerald P and Lee J of the Queensland Court of Appeal held a non-publication order cannot be made merely to protect a party from stress, social harm or a loss of privacy. Such an order would be made only where public access would frustrate the purpose of the court proceeding by inhibiting the enforcement of some substantive law and depriving the court's decision of practical utility (at 44).<sup>39</sup>

A combination of narrow and broad views appears in the *Police Tribunal* case.<sup>40</sup> The Police Tribunal (an inferior court) made a suppression order in respect of an alleged police informant in a hearing of corruption charges against a member of the police force. The tribunal made an order that the alleged informant's name should not be published, nor any information which could identify him, his place or abode. While

the tribunal had been made aware of the alleged informant's potential significance to the hearing, there was no indication the informant would in fact give evidence. The proceedings were in open court and anyone who attended the proceedings could have learnt the potential informant's name.

Fairfax & Sons appealed against the order and McHugh JA and Glass JA of the New South Wales Court of Appeal quashed the order on the basis that it was not necessary to secure the administration of justice and so the order was beyond the tribunal's power. Since the tribunal had permitted the alleged informant to be named in open court, the restriction of publication of the alleged informant's name could not be considered necessary to allow the tribunal to act effectively within its jurisdiction.<sup>41</sup>

Courts may be willing to make orders restricting reporting of proceedings where the subject matter of the proceeding would be destroyed (e.g. in a confidential information<sup>42</sup> or commercial secret case).<sup>43</sup>

Media have standing to appeal against a suppression order when the order imposes on it direct obligations, but where it imposes indirect potential liability for contempt, standing is less clear. There is a "current" of authority for the view that media can appeal against a suppression or pseudonym order where it is alleged to be beyond power, or in excess of jurisdiction.<sup>44</sup>

There are about 1000 suppression or pseudonym orders in force across Australia at any one time in recent years. The annexure headed "Suppression Order Data Analysis" summarises the number of suppression orders in each state or territory. However, this number may not contain suppression orders imposed by statute (for example, the names of children or sexual assault victims). According to News Limited, the figures on the number of suppression orders in South Australia derived from a database may not be entirely correct as data from there has only relatively recently been submitted to News Limited. Further, the media depend upon the practice in each jurisdiction of informing them when suppression orders are made. Some jurisdictions appear to function well in this regard; others less so. Data kept by the ABC reveals similar numbers. As data has been collected for only the past few years, it is hard to properly compare the present and past figures and to more accurately assess the alleged propensity for courts to impose suppression orders.

South Australia has been referred to as "the suppression capital of Australia".<sup>45</sup> In South Australia statutory reforms to the *Evidence Act* came into force in April 2007. While Kenyon observes that some commentators doubt whether the reforms will have much of an impact on the number of orders issued by the courts, the reforms have introduced a stricter approach to what must be considered in granting a suppression order on the basis of prejudice to the administration of justice. Suppression orders are subject to automatic reviews, depending on the nature of the litigation. South Australian law also provides standing for the media to be heard on applications for orders and appeals against orders. The law also provides a mechanism for notification to the media and the Attorney-General of suppression orders.<sup>46</sup>

If one looks at the annexure headed “Suppression Order Data Analysis” it can be seen that Victoria has a considerable amount of suppression orders compared with other states and territories. It is interesting to note that the Chief Justice of Victoria, Marilyn Warren, has recognised the tendency of the courts to issue suppression orders and initiated judicial training on non-publication orders in that state.

Journalists and media organisations claim that there is a growing tendency for the courts, particularly the lower courts, to issue suppression orders. Most journalists and commentators recognise the need for certain statutory non-publication orders such as the identification of children (in some circumstances), victims of sexual assault or other classes of people. However, journalists and commentators have said that suppression orders are often badly drafted, unnecessary, continue after proceedings have been finalised or have no expiry or review date attached and are, except in some states, poorly communicated to the media.

One media lawyer commented that, when the reasons for granting a suppression order are not transparent, public confidence in the court system decreases. Kenyon, quoting a speech from an experienced media lawyer, Peter Bartlett, in 2005 uses this example to illustrate the sometime paucity of arguments offered in support of an application for a non-publication order:

*The trial judge had just made a ruling on an evidentiary point and the following exchange took place:*

*Counsel: Your Honour, we seek a suppression order in relation to your ruling and the reasons for the ruling.*

*Judge: I will grant that suppression order. It’s obvious why it should be granted.*

*... (A) further application was made for a blanket suppression order in relation to the trial, which the trial judge again considered “entirely appropriate”. The end result was two suppression orders made without one iota of legal argument and certainly not one reference to a reported case or even the overarching principle of open justice.*

Some experiences of the media include:

- A Melbourne television court reporter says that, anecdotally, it is accepted among court reporters that suppression orders are becoming more common. Defence lawyers often apply for them, even though they know they are not warranted (eg. to help their clients avoid publicity and embarrassment about criminal charges).
- At the committal hearing of Carlos Barahona at Melbourne Magistrates Court in June 2007, for the rape of an elderly nursing home resident, the defence asked that the name of the nursing home where the offence took place, and where the victim still lived, be suppressed because it “sensationalised” the situation and would place undue stress on the victim. Suppressing the name of the home would thereby lead to suppression of the name of the defendant,

since he had been an employee, and the names of the witnesses who were current employees. The magistrate made the order “to avoid any undue distress or embarrassment” to the victim. As far as we were concerned, that is not her role. There is sufficient legislation in force to protect the victim; all the magistrate did in this case was to make the case unreportable and allow the accused man to retain his anonymity.

- In another case in Victoria a suppression order was granted in a trial involving child sex charges. There were no media representatives in the court at the time. The judge’s associate refused later to give the media reasons the order had been made and the judge said the transcript of the arguments leading up to the order was not to be released.
- One journalist said that some suppression orders were necessary. For example, an order suppressing the appearance of accused; witnesses to be shown a photo board for identification—police don’t want them influenced by anything on the news. (We should note here that contempt laws – see below – prevent the publication of photographs of an accused where identity is in issue.) Another said they understood the need for suppression orders to protect victims, protect people who put themselves at risk by giving evidence (such as informers) and to prevent police investigations being jeopardised.
- Another journalist said that suppressing the identity of children protected was fine, but not when the person was now an adult and the incident happened when they were a child.
- A journalist from Western Australia said that recently there was a 31-year-old woman giving evidence by CCTV about an alleged indecent assault upon her by a priest when she was eight. She thought this was excessive as she was now an adult and was well able to handle herself in a courtroom.
- An ACT journalist says there is no system in the territory to inform members of the media who are not in court when a suppression order is made. He said this was not a satisfactory arrangement. The same journalist said that suppression orders were ambiguous at best and meaningless at worst. He has had to ask the lawyers on many occasions to clarify an order. He said that generally suppression orders in the ACT were reasonable but, when they were no longer needed nothing was done to lift them unless the media suggested it.
- Another journalist said the name of the accused may be suppressed in some cases when the defence has argued that his or her identification may cause distress or embarrassment for the accused’s children.
- A media lawyer said that there are sometimes difficulties and delays in obtaining the precise wording of the suppression order, which makes it very difficult for media organisations (who are often reporting on tight deadlines) to know what they can and cannot report, or what the exact scope of the order is (which makes it difficult to determine whether it should be challenged).



#### **8.4.4. The Victorian situation**

Corrs Chambers Westgarth (Melbourne) provided the audit with examples of suppression orders made in Victoria. They have also submitted suggestions for legislative change to help protect the rights of the media and the public's right to know. Those suggestions could be seen to be appropriate in all jurisdictions.

##### ***Suppression orders in relation to Carl Williams***

Various suppression orders were made in relation to Carl Williams, who was part of a so-called gangland war in Victoria. At times those suppression orders were so vague or difficult to interpret that it made complying with them very difficult. On one occasion an application had to be made to the Court of Appeal to review the form of an order because it was unclear. That application was successful and the order was vacated and another, narrower and clearer order was put in place.

In addition, Carl Williams was found guilty of the Michael Marshall murder on 14 November 2005. However, no report of that result was permitted until 28 February 2007. Even though Williams faced later charges (including murder), the passing of time together with the huge public interest in reporting his result meant that the suppression order should not have been made. Reporting of the Michael Marshall matter should have been permitted and as time passed, any prejudice that would attach to the matter would have dissipated.

##### ***Benbrika suppression contempt***

In the trial involving 13 men charged with terrorism-related offences, an order was made by a magistrate suppressing the identity of a witness from the United States. This was suppressed because the witness claimed he was concerned about his safety. This was even though his plea bargain with US authorities is freely available on the internet and makes it plain that he has agreed to give evidence in any proceeding or any trial. In addition, the defendants in that proceeding all knew the identity of the witness and the evidence he was to give against them.

The witness's identity was published only outside Victoria. It was published in NSW, Queensland and in the *New York Post*. These publications occurred because of the long-accepted principle that a magistrate in Victoria exercising power pursuant to a Victorian Act cannot bind anyone in another state. The publishers of the material in NSW and Queensland (but not in the US) have since been charged with breaching the suppression order. It is alleged by the Commonwealth DPP that the Victorian order made by the Victorian magistrate pursuant to a Victorian Act applies in all other states. This is of great concern to the media and at odds with the long-accepted principle.

##### ***Swimming coach***

Recently Brooke Hansen's coach was charged with sexual offences. He sought and obtained a suppression order over the proceedings. There was no real basis for the order. The media found out about it and applied to have the suppression order lifted. If they had not been successful, the public would not have been likely to know about the case.

***Geelong—Mr Kikos (man in the roof case)***

A magistrate sitting in Geelong in a criminal case involving a man who was squatting in the roof of a department store made a suppression order because of “embarrassment” to the son of the accused man.

Submissions were made to the magistrate on behalf of the media that embarrassment, whether to the accused or to the accused’s son, is not a factor that the court could take into account when considering whether to make a suppression order. The magistrate appeared to accept that proposition—but nevertheless made the order.

**Inability to review Supreme Court suppression orders**

There is authority from the Victorian Court of Appeal to the effect that it is not permissible to review a suppression order made by the Supreme Court. The ruling is to the effect that a suppression order is an interlocutory order and as such cannot be challenged until the conclusion of the entire proceeding. This may be appropriate for most interlocutory rulings in criminal proceedings, but it is not appropriate for a suppression order. The nature of a suppression order is to prohibit the continuing and contemporaneous reporting of a criminal proceeding. If a media organisation has to wait until the conclusion of a trial and then appeal, this fundamentally undermines the open court principles as they apply to the Supreme Court. That is made obvious when one considers a situation where a suppression order is made by the Supreme Court which is plainly wrong. That suppression order prohibits reporting of a matter in the Supreme Court which is of particular public interest. In those circumstances, as the authority in Victorian now rests, the media would not be able to report the matter or challenge the suppression order. This is of great concern to the media.

**8.4.6. Suggested legislative changes to suppression order legislation**

***Standing***

Although the media is generally afforded a right of standing at common law, there is no statutory provision giving them standing to oppose the making of a suppression order. This has arisen as an issue from time to time.

In the view of Corrs, wherever an Act of Parliament provides that a suppression order may be made, there should be a statutory provision which clearly states that representatives from media organisations have a right to be heard and to oppose the making of such an order. There may be a need to define “media organisation” but it should certainly include most major media organisations.

***Territorial limitation of orders***

There is no explicit territorial limitation on suppression orders. In the view of Corrs, a state court cannot bind parties outside the territorial limits of that state when making a suppression order. However, this view is subject to challenge by the Commonwealth’s Director of Public Prosecutions in the case referred to above.

It is essential that there be an explicit territorial limitation on the reach of a suppression order. They should be strictly confined to the state within which they are made.

### ***Suppression orders confined to exceptional circumstances***

Case law provides that courts should depart from the open justice principle and issue suppression orders only in “wholly exceptional circumstances”. This limitation should be enshrined in legislation. So, for example, section 19 of the *Supreme Court Act* 1986 would have the underlined words below added.

At present nearly all statutory provisions allow a court to make a suppression order if it is necessary to do so to avoid prejudicing the administration of justice. In the view of Corrs, this power is somewhat nebulous and therefore probably too broad. It should be confined to particular situations.

First, it is submitted that the “prejudice to the administration of justice” ground should be limited to prejudice in a particular case, as opposed to prejudice to the administration of justice in a general sense. To do this, Corrs propose that limiting words be placed in the relevant legislation. For example, section 19 of the *Supreme Court Act* 1986 (Vic) is shown below. The underlined words may be added to qualify the administration of justice provision.

#### ***Section 19***

*The Court may make an order under section 18 if in its opinion it is necessary to do so in order not to -*

...

*(b) prejudice the administration of justice in a particular case.*

Second, suppression orders made on the grounds of prejudice to the administration of justice generally fall into well-defined categories. These are:

- To ensure a fair trial by protecting juries from prejudicial pre-trial publicity. (This includes suppression of prejudicial facts as well as information from related criminal proceedings).
- To secure the evidence of a witness.
- To prevent particular continuing police investigations from being impeded (including suppression of the identity of undercover operatives).
- To protect victims in blackmail cases and similar cases where the purpose for bringing the charge would be undermined if the trial was made public.

Prejudice to the administration of justice should be strictly and explicitly confined to these categories in legislation. This prevents incremental erosion of the open justice principle.

### ***Abolition of decency and morality grounds***

Although rarely used, there is provision in some legislation for suppression orders to be made to protect public decency and morality. For example, section 19 of the *Supreme Court Act* provides that a suppression order may be made if it is necessary in order not to “offend public decency or morality”.

It has been submitted that such laws are obsolete and should be abolished.

It is established at common law that embarrassing, damaging and unfortunate information often comes to light as part of the public administration of justice. It is not for courts to censor this information and make judgments as to what is appropriate for publication. It serves neither the administration of justice, national security, nor individuals. The media are far better placed to exercise editorial discretion and adjudge what is appropriate for public dissemination. The media is also governed by legislation which regulates obscene and offensive material.

### ***Power to appeal***

Section 17A of the *Supreme Court Act* (Vic) restricts the right to appeal against suppression orders to the Court of Appeal. Generally, no appeal can be made until after the completion of a Supreme Court trial. This means that if a Supreme Court judge makes a suppression order which is clearly unjustified under common law principles, it cannot be appealed against until after the trial is completed. By this time it is usually too late.

By way of example, in the Tony Mokbel cocaine importation trial, Justice Gillard made an order suppressing publication of all evidence. This included evidence which had already been put before the jury and so could not possibly be prejudicial. The order was clearly too wide and could not be justified under case law. Yet an attempt to appeal was unsuccessful because of section 17A. This meant that no reporting of the Mokbel trial could take place until after the trial had finished.

It is submitted by Corrs that there must be an immediate statutory right of appeal from suppression orders.

## **8.5 Non-publication orders in other countries**

We have compared the legislation and practice in Australia with that of New Zealand, US, Canada and the UK. Full details of the power of the courts are set out in C to this report, again prepared by Blake Dawson Waldron. Below is a summary of the rules and practices in each jurisdiction.

In **New Zealand**, the general rule is that hearings of both civil actions and criminal proceedings must take place in public. One element of this rule is the media's right at common law to report on court proceedings. The right of the media is part of the right of freedom of expression contained in section 14 of the New Zealand *Bill of Rights Act* 1990, which provides:

*Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.*

Despite these principles, there are statutes in New Zealand which restrict publicity in relation to certain types of proceedings.

In criminal trials, the court has a right to clear a court for the whole or part of proceedings and to prohibit publication of the name of any witness, or any particulars likely to lead to the identification of a witness; and/or the whole or any part of the evidence adduced or the submissions made in a trial.

According to Burrows and Cheer,<sup>47</sup> non-publication orders are made relatively often, but the reasons for such orders must be compelling and the orders must be no wider than necessary. Non-publication orders may be permanent or only for a certain period, in which case they can be renewed (s138(4) of the *Criminal Justice Act* 1985 (NZ)). In addition, an order can be reviewed by a court at any time and when a member of the news media is taken to have sufficient interest in the matter to apply for a review.

Special rules apply in cases of sexual nature. The complainant's evidence is given in the form of a written statement. The complainant is not examined or cross-examined on the evidence unless he or she wishes to give oral evidence, or unless the judge orders that he or she do so for special reasons. When the complainant gives evidence at the trial, no one is to be present in the courtroom except certain people, including the judge and jury, the prosecutor, the lawyers, the defendant, any accredited news media reporters and some others. If the court considers that the interests of the complainant require it, the court may prohibit the publication of any report giving details of the criminal acts.

There are some blanket prohibitions in New Zealand applying generally to criminal proceedings. It is an offence to publish in a report of court proceedings the names of certain people, or particulars likely to lead to their identification.

In exceptional cases in proceedings where a person is charged with an offence to be proceeded against by indictment, witnesses may be granted anonymity in proceedings. In addition, courts have a very general power to make orders prohibiting the publication, in any report or account relating to any proceedings in respect of an offence, of the name, address, or occupation of the person accused or convicted of the offence, or of any other person connected with the proceedings, or any particulars likely to lead to any such person's identification.

The courts also have powers in particular cases to suppress the publication of certain information. Examples are contained in annexure C.

In civil cases in New Zealand, the District Court and the High Court may sit behind closed doors if absolutely necessary for the administration of justice. This power is exercised only in exceptional cases, for example where cases concern secret processes or commercially sensitive matters where publicity would destroy the whole subject matter and cases during a time of uprising where admission of the public could result in riots. There is uncertainty in New Zealand as to whether reports of such matters may be published.

The common law in New Zealand allows limitations to be placed on the reporting of matters in open court. At common law, courts have a limited inherent power to order that names of parties and witnesses not be published. It is also fairly clear in New Zealand that courts have an inherent power to order that details of evidence not be published.

In the **United States**, suppression orders are referred to as "gag orders". The First Amendment in the United States Constitution guarantees freedom of speech as well as freedom of the press, and this statutory right has a strong influence on the scope of gag orders imposed on the media and others. Generally, courts can only order parties

to a case not to comment on it and do not have authority to stop unrelated reporters from reporting on a case. Since 1931, the US Supreme Court has repeatedly found that attempts to censor the media are presumed unconstitutional since they are an infringement on First Amendment rights.

In the United States, it is within a court's jurisdiction to impose a gag order on participants in a criminal trial to prohibit communication between trial participants and the press.

In criminal law proceedings where the right of the accused to a fair trial is asserted, a court may impose a gag order on trial participants only when there is a clear or serious threat to the fairness of the trial; less restrictive alternatives are not adequate to mitigate the harm; and the gag order would effectively prevent the threatened danger.

A gag order in civil proceedings will only withstand constitutional scrutiny where a court makes findings supported by evidence in certain circumstances outlined in Annexure C.

Judges may also be able to control how the members of the media contact trial participants.

A clear distinction is made between gag orders imposed on participants in a trial and restrictions imposed directly on the media. Generally, the former are considered constitutional and the latter are considered unconstitutional, but there are exceptions.

The US Supreme Court has also recognised that publication of some information may be restrained to protect national security.

Generally, information cannot be censored to the extent it is revealed in open court.

Some US states have statutes which prohibit the publication of names of rape victims and members of the media which break these laws are potentially subject to fines and imprisonment. Supreme Courts in some states, such as Georgia, have found statutes prohibiting the media from naming or identifying rape victims to be unconstitutional, while Supreme Courts in other states, such as South Carolina, have held that such statutes are not constitutional on their face.

In **Canada**, freedom of expression is enshrined in section 2(b) of the Canadian Charter, which guarantees "everyone" the "fundamental freedom" of "thought, belief, opinion and expression, including freedom of the press and other media of communication".

A principle of openness is one of the hallmarks of the Canadian criminal justice system and, as a rule, all proceedings take place in open court. The names of witnesses, victims and accused people in proceedings are generally made public. There are instances in which the law makes exceptions, but these are rare and avoiding mere embarrassment or inconvenience is not considered to be sufficient for making exceptions.

In Canada, suppression orders are referred to as “publication bans”.

Some Canadian statutes impose restrictions on free speech and free press. These are set out in annexure C and they relate to pre-trial proceedings, any information that could identify victims of or witnesses in sexual offences trials, the identification of victims or witnesses and the identity of all victims of sexual offences under 18 years.

More details of the operation of laws and Canadian authorities are set out in annexure C.

In the **United Kingdom** where a trial is public, there is a general right to publish a fair and accurate report of the proceedings contemporaneously and in good faith. Courts do not have inherent jurisdiction to prohibit or postpone the publication of a report of proceedings.

However, a court may order that the publication of the report, in whole or in part, be postponed for a period sufficient to avoid a substantial risk to the administration of justice in the proceedings, or other proceedings which are pending or imminent. Such an order must be expressed precisely and should be in written form. The court has no common law power to make such an order. The court may prohibit publication of the name of a person who has a connection with the proceedings or of any matter with respect to the proceedings. If a person breaches such an order, they will be liable for contempt.

A “person aggrieved”, which may include newspapers and television and radio broadcasters, may appeal, with leave, against a restriction on publication in respect of a trial on indictment, to the Court of Appeal. The decision of that court is final.

There is a raft of statutory restrictions which a court may apply to reporting of proceedings with respect to sexual offences or which involve children or young people. The court may also be empowered to order restrictions at certain stages of serious, complex or long cases (including fraud and terrorism cases).

In civil proceedings, various statutory restrictions may apply in relation to publication of those proceedings, including in relation to “indecent” matter or “indecent medical, surgical or physiological details”, the publication of which would be calculated to injure public morals; marriage (for example, proceedings which concern dissolution or issues of nullity); family proceedings heard before a magistrate’s court; and proceedings involving children, where publication is calculated to lead to the identification of the child in question.

Various statutory restrictions apply to the reporting of criminal proceedings, including committal proceedings; certain preparatory proceedings in relation to fraud; proceedings involving sexual offences where publication could lead to identification of the alleged victim; proceedings involving children or young people, where publication could lead or is likely to lead to identification of the child in question or where publication is of the picture of the child; proceedings in relation to which publication might be made of indecent matters, where publication is calculated to injure public morals; and some in camera proceedings.

Some of the specific statutory regimes are discussed in annexure C.

## 8.6. Contempt of court

There are five main situations in which journalists may fall foul of contempt laws in their reporting functions:

- *Sub judice*—the publication of material which may prejudice a fair trial;
- Failure to comply with a court order—e.g. failure to answer questions which may reveal the source of information and/or publishing material or evidence which has been made the subject of a suppression order;
- Scandalising the court—reporting on allegations that may undermine the public confidence in the administration of justice;
- Reporting on the deliberation of juries;
- Contempt in the face of the court—improper conduct in the court during a hearing.<sup>48</sup>

The second of these types of contempt—what Pearson describes as “disobedience contempt”,<sup>49</sup>—in a situation where a journalist refuses to identify his or her sources of information (such as Harvey and McManus) is dealt with in Chapter 5 of this report.

Aside from the issue of shield laws to protect journalists in these situations, our survey of journalists has not shown contempt to be a major issue of immediate concern, although some commentators and law reform commissions highlight problems with the application or extent of the laws. That is not to say some journalists or broadcasters have not been charged with contempt or consider the possibility seriously.

Only recently the publisher and editor of *The West Australian* newspaper were cleared of a contempt charge. The newspaper published a letter to the editor during the final days of a manslaughter trial. This caused the judge to abort the trial. The accused was re-tried and found not guilty. While the judge found no contempt had been committed, he found the publication of the letter to have been “unwise” in the final days of the trial.<sup>50</sup>

*Sub judice* contempt is probably the most likely form of contempt to pose a challenge for reporters. The rationale is to protect the fairness of a trial and not prejudice the jury (or even witnesses). It is contempt to publish either with the intention to prejudice proceedings or to publish material which has a tendency to prejudice. In the latter case, according to Pearson,<sup>51</sup> it needs only to be proved that the publication was intentional, whether or not the publisher intended to prejudice proceedings.

Some examples of situations which could violate the law include suggestions in a report of the guilt of a person in custody or before a court, when proceedings have not been finalised. If the identity of a person is central, the publication or broadcast of a picture of the accused during the course of the trial may amount to contempt. During a trial arguments may be made in the absence of the jury. It may be contempt to publish



references to the arguments in these situations. It may also be contempt to publish information about the accused's past behaviour or convictions.

Proceedings are *sub judice* in Australia when proceedings are pending. This has generally been found to be when a warrant has been issued, when a person has been arrested or when a person has been arrested and charged. After these events and until facts have been stated in open court, reporters must only publish "bare facts" of the case. (Pearson provides a good outline of the law of *sub judice* contempt.)

There are two possible defences available to *sub judice* contempt:

- Fair and accurate reports of court cases;
- Public interest (or the *Bread Manufacturers* defence).<sup>52</sup>

Some examples of *sub judice* contempt cases against journalists, broadcasters and media organisations are:

- The conviction in 1987 of the publisher of the *Daily Telegraph* and former premier of NSW Neville Wran for the former publishing a statement by Wran at a press conference after the Court of Appeal had overturned the conviction of former High Court Justice Lionel Murphy and ordered a retrial. Wran said that he believed there had been a miscarriage of justice and that Murphy was innocent. Both parties were fined a significant amount.
- In *Hinch v Attorney-General*,<sup>53</sup> the High Court found that Hinch, in broadcasting information about a forthcoming trial of a former Catholic priest in which he named the priest, details of past charges and other information and gave his opinions on the priest's criminality, was not entitled to immunity. The High Court found Hinch had prejudged the priest's guilt and upheld the trial judge's and Victorian Court of Appeal's decision to convict him of contempt. He was jailed for a month and fined.
- The publisher of *Who Weekly* and its editor were found guilty and fined for the publication of a photograph of Ivan Milat after he had been arrested but before his trial. The court held that the publication had the tendency to interfere with the course of justice.
- *The Age* in Melbourne was fined substantially for publishing details of an accused man's convictions before the trial commenced.

Pearson<sup>54</sup> provides useful summaries of some of the leading *sub judice* contempt cases.

We do not intend to go into the problems posed by the internet in relation to contempt. This is a further problem for the media and the justice system which may well benefit from further research and comment. Suffice to say that commentators and the NSW Law Reform Commission<sup>55</sup> note the potential and real possibilities of contempt on the net are significant.

Contempt by scandalising the court may arise from such actions as impugning the authority of the court by making malicious and baseless allegations about the propriety and prejudice of the judiciary in a particular case; making claims that a judge had been influenced by outside pressures in making his/her decision; and making threatening or potentially threatening remarks about a magistrate's decision to consider an application for bail.

Once again, Pearson provides a useful summary of cases where a writer or broadcaster has been charged and convicted of contempt or where contempt charges have been contemplated by the court.<sup>56</sup>

The law in relation to reporting the deliberations of juries is largely unsettled and we do not propose to go further into the issue here, save to say that interviews with jurors have been reported without stepping over the contempt line. As mentioned above, there are various state and territory statutes which control the extent to which jury deliberations can be reported.

Contempt in the face of the court relates to conduct in the actual courtroom. Pearson relates a number of contempt cases where he says the contempt is usually committed when emotions are running high.<sup>57</sup>

## **8.7. Observations**

From what we have outlined above, we make the following observations.

- The principle of open justice is well accepted by all levels of government, the judiciary, the media and the public generally. However, commentators and practitioners note there are a number of ways the principle has been eroded over recent years. Clearly one of the greatest causes of this is the perceived threat posed to society by the actions of terrorists (dealt with elsewhere in this paper). However, limitations on the access by the media to court documents and information and an increase and/or tendency by the courts (particularly the lower courts) to issue suppression orders are two examples where the principle is seen as threatened.
- Journalists report both the difficulty of gaining access to court documents and information and the lack of clear guidelines applicable to such access. In some cases, journalists report a virtual capriciousness on the part of some members of the judiciary and court officers when deciding whether to allow access.
- There is no uniform approach to the rules of access either across the state and territory jurisdictions or even within each jurisdiction. For example, in Victoria the Supreme Court may have a clear practice but the Magistrates' Courts do not. One Magistrate's Court may make access easier, but a court in a nearby suburb may make it extremely difficult. It will often depend on the attitude of the presiding magistrate and/or registry staff.
- Where a jurisdiction has a media liaison officer (or other similar named officer) to act as a point of contact for the media, the system works more efficiently and more predictably.

- There is a lack of uniformity across jurisdictions about rules relating to the identification of children accused of crimes, victims of crimes, as witnesses and their siblings as well as the naming of the accused which may tend to identify the child or children involved.
- Across all jurisdictions there appear to be commonly encountered problems with suppression orders:
- The difficulty in getting clear information about whether a suppression or pseudonym order has been made and the reasons and legal bases for making such an order.
- The apparent increase or tendency for courts to make suppression orders.
- The scope, precision and duration of the orders.
- The varying practice and method across jurisdictions for informing media organisations that a suppression order has been made or amended, thereby exposing the media unnecessarily to the inadvertent breach of the order.
- The standing of media organisations to appear in relation to the making or amending of or appeal against a suppression order. This also raises the issue of when and how the media are informed that an application is being made and if the media has the right to know.
- No particular problems were raised by journalists about the operation of contempt laws, except for “disobedience contempt” (i.e. the refusal of a journalist to answer questions about the source of information). This contempt is dealt with in Chapter 5 of this report.
- The lack of uniformity in legislation and/or rules governing access to court information and practices and suppression orders across all Australian jurisdictions poses added problems for media organisations which operate across borders and creates anomalies from one jurisdiction to the next.

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<sup>1</sup> NSW Law Reform Commission *Contempt by Publication* (2000) Discussion Paper 43 (NSWLRC 2000). See also Sharon Rodrick *Open Justice, the Media and Avenues of Access to Documents on the Court Record* (2006) 29(3) UNSW Law Journal (Rodrick 2006)

<sup>2</sup> *Idoport Pty Ltd v National Australia Bank*, 47 [2001] NSWSC

<sup>3</sup> Mark Pearson, *The Journalist's Guide to Media Law* 3<sup>rd</sup> edition (2007) Allen & Unwin (Pearson 2007) p 62

<sup>4</sup> *Scott v Scott* [1913] AC 417 at 5

<sup>5</sup> *Raybos Australia Pty Ltd v Jones* [1985] 2 NSWLR 47 at 58

<sup>6</sup> The Hon Wayne Martin, Chief Justice of Western Australia *Access to Justice – the Media, the Courts and the Public Record*, APC Public Address, 22 March 2007 (Martin 2007)

<sup>7</sup> Media, Entertainment & Arts Alliance *Official Spin: Censorship and Control of the Australian Press* 2007 (MEAA 2007) at p 12

<sup>8</sup> Martin 2007, see note 6

<sup>9</sup> *The Australian*, 23 August 2007

<sup>10</sup> Attorney-General's Department of NSW *Review of the Policy on Access to Court Information*, April 2006 (AGNSW 2006)

<sup>11</sup> Martin 2007, see note 6

<sup>12</sup> Rodrick 2006 at p 107; submissions by John Fairfax Holdings Limited (adopted by Free TV Australia) and the Australian Press Council (both undated) and a submission by certain media interests dated 24 June 2006

<sup>13</sup> Andrew T Kenyon *Not Seeing Justice Done: Suppression Orders in Australian Law and Practice*, paper given to The Courts and the Media Conference, CMCL and APC, Melbourne Law School, 27 July 2007 (forthcoming (2007) 27 Adelaide Law Review)

<sup>14</sup> Richard Coleman provided the audit with a copy of Fairfax Media's submission to the NSW Government following the 2004 amendments and an internal memorandum to journalists following the recent amendments. We are grateful for this information.

<sup>15</sup> Media Release, NSW Attorney-General, 5 October 2007

<sup>16</sup> Pearson 2007, *supra* at p 146

<sup>17</sup> *Ibid* at pp 148 -162

<sup>18</sup> *Herald & Weekly Times Limited v Medical Practitioners Board of Victoria* [1999] 1 VR 267 at 278 per Hedigan J

<sup>19</sup> *John Fairfax & Sons Limited v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 477

<sup>20</sup> *Raybos*, *supra* at 55; *ABC v Parish* (1980) 29 ALR 228 at 232-233 and 245-246; *Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1 at 20

<sup>21</sup> *G v The Queen* (1984) 35 SASR 349; *R v Lennon* (1985) 38 SASR 356; *Advertiser Newspapers Ltd v F* (1985) 38 SASR 367

<sup>22</sup> *Reid v Howard* [1995] 184 CLR 1; *SG v DPP* [2003] NSWSC 413

<sup>23</sup> *Ex parte Queensland Law Society Inc* [1984] 1 Qd R 166 at 170 per McPherson J

<sup>24</sup> *Scott*, *supra*

<sup>25</sup> *Witness v Marsden* (2000) 49 NSWLR 429

<sup>26</sup> *John Fairfax & Sons Limited v Police Tribunal of New South Wales* (1986) 5 NSWLR 465

<sup>27</sup> *B v Attorney General* [1965] 3 All ER 253

<sup>28</sup> *Medical Practitioners case*, *supra* at 281

<sup>29</sup> *David Syme & Co Limited v General Motors-Holden's Limited* [1984] 2 NSWLR 294

<sup>30</sup> *G v Day* [1982] 1 NSWLR 24

<sup>31</sup> The power being recognised in, for example, *Ex parte QLS*, *supra* but stated not to be held in *Attorney-General (NSW) v Mayas Pty Limited* (1988) 14 NSWLR 343 at 358 and various other cases)

<sup>32</sup> *Raybos*, *supra* at 55. However note the comment of McHugh J in the *Police Tribunal* case, *supra* at 479 to the effect that where an order binds those present in court but it is apparent to others who learn of it that an act outside court would frustrate the order, such an act would be contempt.

<sup>33</sup> *Ibid*

<sup>34</sup> *Grassby v The Queen* (1989) 168 CLR 1 at 16-17

<sup>35</sup> See the minority view of Kirby P in *John Fairfax v Local Court*, *supra* and, for example, *Medical Practitioners case*, *supra*, (which distinguished the majority view in *JF v Local Court*)

<sup>36</sup> *David Syme case*, *supra*

<sup>37</sup> *Johnston v Cameron* (2002) 195 ALR 300

<sup>38</sup> These are inconsistent with *J v L & A Services Pty Limited* [1993] 2 Qd R 380 and English authority that deterrence of a litigant by the prospect of adverse publicity at trial is not a sufficient reason for closing the court: *B v AG*.

<sup>39</sup> In dissent, Pincus J preferred a wider view of the suppression power, holding:

"In the absence of a restriction on publicity, damage will be caused to the public interest, to a class of persons (for example, the depositors in a bank) or to individuals to such an extent and of such a kind as absolutely to require some relief, in the interests of justice. These are the 'unacceptable consequences' referred to by ... Mahoney JA" (at 49)

<sup>40</sup> *Fairfax & Sons Limited v Police Tribunal of New South Wales*, *supra*

<sup>41</sup> In contrast, Mahoney J, dissenting, considered it within the tribunal's power to make orders to protect those involved in proceedings even though they were not parties or witnesses. However it was not valid to make an order to protect a person who was not even willing to be an informant as such an order would not have the necessary relationship to the proceedings.

<sup>42</sup> *Versace v Monte* [2001] FCA 1565

<sup>43</sup> *Johnston v Cameron* (2002) 195 ALR 300

<sup>44</sup> *Medical Practitioners case*, *supra*

<sup>45</sup> Kenyon, *supra* (at note 18)

<sup>46</sup> See a discussion of the amendments and the practice in South Australia in Kenyon, *ibid* at pp 21-27

<sup>47</sup> John Burrows and Ursula Cheer, *Media Law in New Zealand* (4th ed. 1999) at p233

<sup>48</sup> NSW Law Reform Commission *Contempt by Publication* (2000) Discussion Paper 43; Australian Law Reform Commission, 1987 Report No 35, *Contempt*.

<sup>49</sup> Mark Pearson (2007), *supra* at 85

<sup>50</sup> *The State of Western Australia v Armstrong & Anor*, [2007] WACA 204, Martin CJ, 4 October 2007

<sup>51</sup> Pearson 2007, *supra* p 90

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<sup>52</sup> See Pearson 2007, pp 95-108.

<sup>53</sup> *Hinch v Attorney-General (Vic)* (1987) 164 CLR

<sup>54</sup> Pearson 2007, supra pp 96-108

<sup>55</sup> See note 1

<sup>56</sup> Pearson 2007, supra pp 110-114

<sup>57</sup> *Ibid* p 116

## CHAPTER 8

### THE JUSTICE SYSTEM

#### ANNEXURE A

#### Court rules and practices about access to documents

##### **Court: High Court of Australia**

**Contact details of court**  
The High Court has a registry office in every capital cities. Contact details are on the website.

**Phone:** (02) 6270 6857 (Canberra – principal registry)

**Website:** [www.hcourt.gov.au](http://www.hcourt.gov.au)

**Fax:** (02) 6273 3025

**Address:** Parkes Place, PARKES ACT 2600; PO Box 6309 KINGSTON ACT 2604

##### **Legislation, Rules or Practice Notes governing access to court documents including:**

- pleadings
- affidavits / statutory declarations
- exhibits
- transcripts

##### **Civil and criminal jurisdiction**

*High Court Rules* 2004 – Rule 4.07.4

On payment of the prescribed fee, any person may inspect and copy **any document filed**, except for:

- affidavits and exhibits to affidavits that have not been received in evidence in court; and
- documents disclosing the identity of a person if the disclosure of that identity is prohibited by an Act or order of the court.

*High Court of Australia (Fees) Regulation* 2004 (Cth)

The fees for inspecting and copying are set out in Part 2 of Schedule 1. They are \$15 an hour for the cost of the registry searching for the documents, and \$3 a page for copying.

In relation to affidavits and exhibits to affidavits being received in evidence “in court”, the court has held that “in court” does in include “in chambers”. *Oil Basins Ltd v Commonwealth* (1993) 178 CLR 643. Many applications for interlocutory relief in the High Court are heard by a justice in chambers, so affidavits and exhibits received in evidence in those applications would not be available for inspection.

No additional information provided

##### **Information regarding access to documents on Court’s website**

##### **Information regarding access to documents from telephoning court**

Phone registry in Canberra (6270 6857) – It is necessary to first phone the registry to find out where the particular file is (it may be in Canberra or in the local registry). Then the person seeking to inspect should send a letter or fax to confirm the arrangements, because the registry may need to arrange to send the file from Canberra to the local registry. Also, if judgment in the matter is reserved, the file may not be available to be sent to a local registry.

**Court: High Court of Australia****Other  
comments**

In that case, the registry may be able to arrange for copies of the particular documents the person is seeking to be provided.

**Transcripts** are available free of charge at [www.austlii.edu.au/au/other/hca/transcripts/](http://www.austlii.edu.au/au/other/hca/transcripts/)

**Court: Federal Court of Australia****Contact details  
of court**

The court has  
registries in each  
capital city

**Phone:** Canberra: 02 6267 0566; Sydney: 02 9230 8567;  
Darwin: 08 8941 2333; Brisbane: 07 3248 1100;  
Adelaide: 08 8219 1000; Hobart: 03 6232 1715;  
Melbourne: 03 8600 3333; Perth: 08 9268 7100  
**Website:** [www.fedcourt.gov.au](http://www.fedcourt.gov.au)

**Legislation,  
Rules or  
Practice Notes  
governing access  
to court  
documents  
including:**

- pleadings
- affidavits /  
statutory  
declarations
- exhibits
- transcripts

**Information  
regarding access  
to documents on  
court's website****Civil jurisdiction (no separate criminal jurisdiction)**

*Federal Court Rules* Order 46

**sub-rule 2** – a person **may** inspect pleadings, judgments, orders and other documents such as notices of appearance, unless the court has ordered that a document is confidential

**sub-rule 3** – a person **must not** inspect affidavits, statements, lists of discovered documents, interrogatories and answers, subpoenaed documents, without leave of the court or a judge

**sub-rule 4** – a person **must not** inspect any documents not specified in sub-rules 2 or 3 without leave of the court, a judge or a registrar.

The court's website has two documents outlining the court's practice for access to documents by media representatives:

**Media access to court documents** – This documents sets out the same divisions of documents as provided for in the Rules.

However, the documents explains that, rather than having to make a formal application to inspect documents covered by sub-rules 3 and 4 (such as affidavits and exhibits), a media representative may apply for leave by completing the form provided, which will be sent to the judge presiding in that matter. The judge will then decide whether to approve the request in whole or part, and whether to impose conditions on access. The document also explains that, as a general rule, leave will be granted to access documents such as affidavits and exhibits if those documents have been admitted into evidence or read in open court.

**Media access to court transcripts** – This document sets out how a media representative can apply for a transcript. The general position is that transcript is available to the media, provided the relevant fees are paid. The court provides a form to be completed, which includes an agreement by the media representative that copyright in the transcript remains with the Crown, the transcript will not be provided until fees are paid, and the transcript will only be used for the purpose of reporting on the proceeding. The form is completed by the media representative

<b>Court:</b>	<b>Federal Court of Australia</b>
	and sent directly to the court's transcription service provider (Auscript). If the parties to the proceeding have not ordered a transcript, the media representative will have to pay the fees associated with preparing the transcript. (If parties have ordered a transcript, the charges for the media representative are for copying only.)
<b>Information regarding access to documents from telephoning court</b>	Phone Sydney registry (9230 8567) – it is not necessary to send a letter or fax to the registry first – you can attend in person, and fill out the inspection form and pay the fee. If the file is in the file room (which most files are) you will be able to inspect the file straight away.
<b>Other comments</b>	N/A

<b>Court:</b>	<b>Supreme Court of Victoria</b>	
<b>Contact details of court</b>	<b>Phone:</b>	General Registry: 03 9603 6111, Media Liaison Officer: 03 9603 6158
	<b>Website:</b>	www.supremecourt.vic.gov.au
	<b>Fax:</b>	03 9603 9400
	<b>Address:</b>	210 William Street, Melbourne. Registry: Level 2, 436 Lonsdale Street, Melbourne
<b>Legislation, Rules or Practice Notes governing access to court documents including:</b>	<b>Civil jurisdiction</b>	<b>Criminal jurisdiction (if different)</b>
<ul style="list-style-type: none"> <li>• pleadings</li> <li>• affidavits / statutory declarations</li> <li>• exhibits</li> <li>• transcripts</li> </ul>	<i>Supreme Court (General Civil Procedure) Rules 2005</i> <b>Rule 28.05</b> – any person, on payment of prescribed fee, may inspect and copy any document file in a proceeding, except for: <ul style="list-style-type: none"> <li>• a document the court has ordered remain confidential;</li> <li>• a document which in the opinion of the Prothonotary, ought to remain confidential to the parties. (A person may obtain leave of the court to inspect and copy such a document.)</li> </ul>	<i>Supreme Court (Criminal Procedure) Rules 1998</i> <b>Rule 1.11(4)</b> - Documents filed in criminal proceedings are not open for inspection unless the court, the Prothonotary, Deputy Prothonotary or Registrar directs otherwise.
<b>Information regarding access to documents on court's website</b>	The court has on its website a document entitled "Covering the Courts: A basic guide for journalists", prepared by the Courts Information Officer. This guide covers a variety of issues (e.g. contempt, how court proceedings work, legislative restrictions on reporting) including information about accessing court documents. This guide includes information about magistrates courts and county courts.	
<b>Information regarding</b>	Phone registry – it is not necessary to send a letter or fax	



Court: Supreme Court of Victoria	
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access to documents from telephoning court	first; a person wishing to inspect the file can attend at the Registry. However, it is advisable to ring the registry first and advise of the file the person wishes to inspect. This is so the registry can confirm that the file is in the registry, and not, for example, in a judge's chambers.
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Other comments	N/A
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Court: Supreme Court of Queensland	
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Contact details of court	Phone: Civil: 07 3247 4313; Criminal: 07 3247 4424
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	Website: <a href="http://www.courts.qld.gov.au/courtstrib/supc.htm">www.courts.qld.gov.au/courtstrib/supc.htm</a>
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	Fax: Civil: 07 3247 5316; Criminal: 07 3247 4906
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	Address: Law Courts Complex, George Street, Brisbane. PO Box 15167 City East, Qld 4002
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Legislation, Rules or Practice Notes governing access to court documents including:	<p><b>Civil jurisdiction</b></p> <p><i>Uniform Civil Procedure Rules</i></p> <p><b>Rule 981</b> – A person may ask the registrar to search for and permit the person to inspect a document in a court file. If the person is not a party or a representative of a party, the person must pay the prescribed fee. The registrar must comply with a person's request, unless there is a court order restricting access to the file, or the file or document requested is being used by the court.</p>	<p><b>Criminal jurisdiction (if different)</b></p> <p><i>Criminal Practice Rules 1999</i></p> <p><b>Rule 56</b> – A person may, on paying the prescribed fee, inspect an exhibit produced at trial, unless the proper officer of the court considers it could risk the exhibit's security or the person's safety. (The trial judge may order that an exhibit not be inspected until further order.)</p> <p><b>Rule 57</b> – A person may, on paying the prescribed fee, inspect a court file and documents in the file except for an exhibit or an indictment. A person may also obtain from the court's proper officer a certified copy of the details (except for details about the jury) noted on an indictment on the file. Access under Rule 57 is subject to the court making an order restricting access to a file.</p>
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Information regarding	No further information available on the website.
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**Court: Supreme Court of Queensland**

access to  
documents on  
court's  
website

**Information  
regarding  
access to  
documents  
from  
telephoning  
court**

Phone Registry – at the Registry there is a Search and Copy counter. It is there that a person can apply to inspect a file, and pay the required fee. Once the person informs the registry of the files they would like to inspect, they will be given a time to come back when the files are available. The Qld Supreme and District courts (for civil matters) use an “eCourt” system, where details about a matter (including what documents have been filed and when) can be viewed online – [www.courts.qld.gov.au](http://www.courts.qld.gov.au)

Phone Registry:

- in relation to exhibits (Rule 56) – a person can attend in person at the Registry and request to inspect exhibits. A registry officer will check to file to see if there are exhibits, and a deputy registrar will also check to make sure there are no exhibits which cannot be inspected (e.g. if the exhibit relates to children). If there are exhibits which can be inspected, the person will pay the fee (\$12) and can then inspect the exhibits.
- in relation to indictments (Rule 57) – the person requesting the certificate of indictment must send a letter explaining the reasons for seeking the certificate, and specifying the judge, defendant, victim (if applicable) and date of indictment, and enclosing the \$45 fee. It will take a few days to a week to process, and the certificate will be sent to the person requesting it.

**Other  
comments**

N/A

**Court: Administrative Appeals Tribunal**

**Contact details  
of court**

**Phone:**

Canberra: 02 6243 4611, Sydney: 02 9391 2400;  
Brisbane: 07 3361 3000; Adelaide: 08 8201 0600;  
Hobart: 03 6232 1712; Melbourne: 03 9282 8444;  
Perth: 08 9327 7200

**Website:**

[www.aat.gov.au](http://www.aat.gov.au)

**Legislation,  
Rules or**

No relevant provisions in the *Administrative Appeals Tribunal Act 1975* (Cth) or the *Administrative Appeals Tribunal*

**Court: Administrative Appeals Tribunal****Practice Notes** *Regulations 1976 (Cth)***governing access  
to court  
documents  
including:**

- pleadings
- affidavits /  
statutory  
declarations
- exhibits
- transcripts

**Information  
regarding access  
to documents on  
court's website**

No information relating to non-party access on website.

**Information  
regarding access  
to documents  
from  
telephoning  
court**Called the AAT in Sydney (9391 2400) on 14 September 2007 – non-parties cannot have access to tribunal files. Members of the public can attend hearings, and decisions are published in [www.austlii.edu.au](http://www.austlii.edu.au)**Other comments** N/A**Court: Supreme (and District) Court of South Australia****Contact  
details of  
court****Phone:** 61 8 8204 0476**Website:** <http://www.courts.sa.gov.au/courts/supreme/index.html>**Fax:** 61 8 8212 7154**Address:** Registrar's Office  
1 Gouger Street, Adelaide, South Australia, 5000.**Legislation,  
Rules or  
Practice  
Notes  
governing  
access to  
Court  
documents  
including:****Civil jurisdiction**

- Rule 18 *Supreme Court Civil Rules* 2006 (SA) Registrar is proper person to have custody of the court files.
- s131(2) *Supreme Court Act* 1935 (SA)
- Practice Direction 1.1 "Searching Court Files"  
Permission to search court files can be obtained by sending letter or email to the Registrar and without notice to any party or person interested.

**Criminal jurisdiction (if  
different)**

- Rules 14 and 14 *Supreme Court Criminal Rules* 1992 (SA) relate to court records and exhibits. Generally, judicial permission is required before criminal court records can be inspected.
- s131 *Supreme Court Act* 1935 (SA)

- pleadings
- affidavits /  
statutory  
declarations
- exhibits

**Court: Supreme (and District) Court of South Australia**

- transcripts

**Information regarding access to documents on court's website**

- There is a "transcript" link which provides a phone number to call regarding transcripts for cases currently before the court. (Sylvia Stimburys on 61 8 8204 0184.)
- Website provides a link to practice directions and SC rules which govern access to court files.

**Information regarding access to documents from telephoning court**

If you are a non party you can view a file but not to all the documents. Affidavits are not available. \$12 viewing fee; copying \$3 page transcripts \$5 per page. If from 1996 or before files need to be brought up from the state records.

Notice to give to court:

- if active file, might need to wait a few days because the file will be in chambers. They can call when file is ready.
- otherwise, access is almost immediate. .

**Other comments**

Website easy to use and links to document access information are fairly easy to find.

Court personnel were very helpful and polite.

Criminal files for SC and DC are held in criminal registry in District Court: (08) 8204 0484. Can look on some things but not others on file. Registrar will decide.

Put a request in email or fax – name of accused or file number and rough date of hearing.

\$12.70 search fee for finalised matter (current matter no search fee)

transcript is \$5 page

\$3 page for copy of file

**Court: Supreme Court of the Australian Capital Territory**

**Contact details of court**

**Phone:** (02) 6267 2707

**Website:** <http://www.courts.act.gov.au/supreme/>

**Fax:** (02) 6257 3668

**Address:** GPO Box 1548 Canberra ACT 2601

**Legislation, Rules or**

**Civil jurisdiction**

**Criminal jurisdiction (if different)**

**Court: Supreme Court of the Australian Capital Territory**

<b>Practice Notes governing access to court documents including:</b>	<ul style="list-style-type: none"> <li>- o 66 r 11 and o 83 r6 <i>Supreme Court Rules</i></li> <li>- rule 2903 <i>Court Procedure Rules 2006</i> (ACT) Non-parties can inspect and copy any document filed at the registry. However, leave of the court is required for the following documents: <ul style="list-style-type: none"> <li>- documents under order of confidentiality</li> <li>- affidavits that have not been read at court</li> <li>- part of an affidavit ruled in admissible</li> <li>- documents given on discovery etc</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>- o 80 r 33 <i>Supreme Court Rules</i></li> <li>- rule 4053 <i>Court Procedure Rules 2006</i> (ACT) Same as civil.</li> </ul>
<b>Information regarding access to documents on court's website</b>	<ul style="list-style-type: none"> <li>- Links to "services &gt; access to documents" provides information regarding access to both criminal and civil court files.</li> <li>- Links to "services &gt; court reporting" provides a contact number for transcript requests.</li> </ul>	
<b>Information regarding access to documents from telephoning court</b>	<p>Procedure – come in and request file. No inspection fee but copying is 20c a page.</p> <p>Registry staff will take off stuff that you don't have access to and you can go through the rest</p> <p>Files that are older (i.e. 10 years) will take two days to order and registry will call when its there.</p>	Same for criminal.
<b>Other comments</b>	<p>Website easy to use and very clear and links to document access information are very easy to find.</p> <p>Registry staff were very helpful and polite</p>	

**Court: Supreme Court of Western Australia**

<b>Contact details of court</b>	<b>Phone:</b>	(08) 9421 5333
	<b>Website:</b>	<a href="http://www.supremecourt.wa.gov.au/">http://www.supremecourt.wa.gov.au/</a>
	<b>Fax:</b>	(08) 9221 4436
	<b>Address:</b>	Stirling Gardens, Barrack Street, Perth WA 6000

<b>Court: Supreme Court of Western Australia</b>		
<b>Legislation, Rules or Practice Notes governing access to court documents including:</b>	<b>Civil jurisdiction</b> Unable to locate.	<b>Criminal jurisdiction (if different)</b>
<ul style="list-style-type: none"> <li>• pleadings</li> <li>• affidavits / statutory declarations</li> <li>• exhibits</li> <li>• transcripts</li> </ul>		
<b>Information regarding access to documents on court's website</b>	<ul style="list-style-type: none"> <li>- link to "Publications &gt; transcripts" only provides some specific transcripts in PDF and no further contact information.</li> <li>- it is very difficult to identify the content of practice directions without knowing what year they were published. A "search" mechanism is available. Using the keywords "access" and "court files" produced no practice notes links that are relevant to access to court documents.</li> </ul>	
<b>Information regarding access to documents from telephoning court</b>	Entitled to view public docs i.e. orders, judgements etc, if you want to view all of them letter or fax to principal registrar for approval; should say why you want to see them.	Criminal listings: need to make an application in writing to principal registrar stating your reasons– no access to sexual assault files.
<b>Other comments</b>	No fee – photocopying \$3.00 Difficult to locate document access information on the website. Court staff were very helpful.	No copies are allowed.

<b>Court: Australian Industrial Relations Commission</b>		
<b>Contact details of court (Principal location)</b>	<b>Phone:</b> (03) 8661 7777 <b>Website:</b> <a href="http://www.airc.gov.au/">http://www.airc.gov.au/</a> <b>Fax:</b> (03) 9655 0481 <b>Address:</b> Level 4, 11 Exhibition Street, Melbourne 3001	
<b>Legislation,</b>	<b>Civil jurisdiction</b>	<b>Criminal jurisdiction (if</b>

<b>Court: Australian Industrial Relations Commission</b>		
<b>Rules or Practice Notes governing access to court documents including:</b>	More research required. [Note: it has been very difficult to find any information on access to court files in relation to the WA Supreme Court.]	<b>different)</b>  N/A
<ul style="list-style-type: none"> <li>• pleadings</li> <li>• affidavits / statutory declarations</li> <li>• exhibits</li> <li>• transcripts</li> </ul>		
<b>Information regarding access to documents on court's website</b>	<ul style="list-style-type: none"> <li>- Transcripts that have been ordered by the Member sitting on a case are available about 10 days after the recording is made on the website by date.</li> <li>- transcripts for termination of employment cases heard by a single Member, or confidential transcripts, are not available to the public.</li> </ul>	
<b>Information regarding access to documents from telephoning court</b>	<p>U matter files – are parties only – terminations. You can't look at them.</p> <p>C (general matter) – file and AG (agreement) files you can look at (there might still be a bar placed on it by the member)</p> <p>Put in a request through website request for file and they will let you know whether you can view it.</p> <p>Must look at file on the premises – email requesting files to be brought in (names and file number).</p>	
<b>Other comments</b>	Commission staff were very helpful.	

## ANNEXURE B

### STATUTORY PROHIBITIONS ON PUBLISHING MATERIAL IN AUSTRALIAN JURISDICTIONS

Issue	Australian Laws	Comments
Identification of victims of sexual assault	<p><i>Crimes Act 1900</i> (NSW) s 578A</p> <p><i>Evidence (Miscellaneous Provisions) Act 1991</i> (ACT)</p> <p><i>Sexual Offences (Evidence and Procedure) Act</i> (NT), ss 6, 7</p> <p><i>Criminal Law (Sexual Offences) Act 1978</i> (Qld), s 6, ss 7, 8</p> <p><i>Evidence Act 1929</i> (SA) s 71A.</p> <p><i>Evidence Act 2001</i> (Tas) s 194K</p> <p><i>Judicial Proceedings Act 1958</i> (Vic), s 4(1A), (1B)</p> <p><i>Evidence Act 1906</i> (WA), s 36C</p>	<p>In each State and Territory, there are restrictions on the publication of reports of the trial of sexual offences, which restrict the identification of the victim of the alleged offence. Additionally, some States prevent the publication of the accused person.</p> <p>In NSW, it is an offence to publish any matter identifying the victim, irrespective of whether the proceedings have been dispensed with. The provision is expressly in addition to other restrictions, however it does not apply to victims:</p> <ul style="list-style-type: none"> <li>a) over 14 years who have consented; or</li> <li>b) under 14 years where a court has authorised disclosure.</li> </ul> <p>In the ACT, it is an offence to publish the name or any other identifying information of the victim, without the victim's consent.</p> <p>In the Northern Territory, it is prohibited to publish the name, address, school or place of employment of a complainant in a sexual offence proceeding, or other details likely to identify the complainant, unless a court has authorised. It is also prohibited to published the defendant's name, unless a court has authorised, or unless committed for trial or sentence.</p> <p>In Queensland, it is an offence to publish a report of a trial that reveals the name or other identifying information of the victim, and the accused, unless committed for trial.</p> <p>In South Australia, in proceedings involving a sexual offence, there are particular restrictions, at various stages of criminal and civil proceedings, preventing or restricting identification of the complainant and accused.</p>



Issue	Australian Laws	Comments
		In Tasmania, it is statutory contempt to name or publish other identifying information of the victim of the crime or another witness other than the accused (and the accused if the charge is for incest), unless the court has authorised publication. The victim's consent is no defence to the contempt, <i>R v The Age Co Ltd</i> (2000) 113 A Crim R 181.
Identification of parties to and witnesses in family law proceedings	<i>Family Law Act</i> 1975 (Cth), s 121	s 121(1) prohibits any person from publishing any account of any proceedings or part of proceedings that identifies a party to proceedings, a person related to, or associated with, a party to proceedings, a person in any way concerned with the matter to which the proceedings relate, or a witness to proceedings. Ss (3) provides that identification is held to occur where the account includes a photograph or the identifiable voice of the person, or other prescribed particulars. Under ss (9), it is a defence to publication if court authorised, or if directed by the court.
Identification of children involved in criminal proceedings	<p><i>Children (Criminal Proceedings) Act</i> 1987 (NSW), s 11</p> <p><i>Crimes Act 1900</i> (NSW)</p> <p><i>Youth Justice Act 2007</i> (NT), ss 43 and 50</p> <p><i>Juvenile Justice Act 1992</i> (Qld), ss 301 and 234</p> <p><i>Young Offenders Act 1993</i> (SA)</p> <p><i>Crimes (Family Violence) Act 1987</i> (Vic), s 24</p>	<p>The <i>Children (Criminal Proceedings) Act</i> 1987 (NSW) prohibits the identification of children involved in criminal proceedings, where the child is:</p> <ul style="list-style-type: none"> <li>a) a person to whom criminal proceedings relate, or a witness in criminal proceedings, being a child when the offence was committed to which those proceedings relate;</li> <li>b) mentioned in criminal proceedings, in relation to something that occurred when the person was a child;</li> <li>c) otherwise involved in criminal proceedings when a child; or</li> <li>d) the brother or sister of the victim of criminal proceedings, the victim and the person being under 18 years when the offence was committed.</li> </ul> <p>Under the Northern Territory legislation, it is an offence to publish information and details about the diversion of a youth,</p>

Issue	Australian Laws	Comments
		<p>except in very limited circumstances (s 43). It is an offence to publish a report or information about proceedings in the Juvenile Court, or the result of proceedings against a youth, if the court orders otherwise (s 50).</p> <p>Under the <i>Juvenile Justice Act 1992</i> (Qld), a report of criminal proceedings may not be published if it includes any identifying information of a child charged with an offence (s 301), unless the court makes an order to that effect (s 234).</p>
Matching organ donors and donees	<i>Human Tissue Act 1983</i> (NSW) s 37	This section operates to prevent the disclosure of any information that causes the identity of a person that has given human tissue or blood, or will receive the same, to become publicly known.
Guardianship and Children's Court proceedings	<p><i>Children and Young Persons (Care and Protection) Act 1998</i> (NSW), s 105</p> <p><i>Children and Young People Act 1999</i> (ACT), s 61A</p> <p><i>Child Protection Act 1999</i> (Qld), ss 189 and 193</p> <p><i>Children's Court Act 1992</i> (Qld), s 20</p> <p><i>Children's Protection Act 1993</i> (SA), s 59A</p> <p><i>Children, Youth and Families Act 2005</i> (Vic), s 534</p> <p><i>Children's Court of Western Australia Act 1988</i> (WA), s 35</p> <p><i>Children, Young Persons and their Families Act 1997</i> (Tas), ss 40 and 103</p> <p><i>Magistrates Court (Children's Division) Act 1998</i> (Tas), s 12</p> <p><i>Youth Justice Act 1997</i> (Tas), ss 22, 30, 31, 45 and 108</p>	<p>In all States and Territories, there is either some statutory restriction, or statutory power to impose a restriction, on public hearings in Children's Courts. There are also restrictions on the publication of information from such proceedings.</p> <p>NSW legislation prohibits the publication of the name of a child or young person who:</p> <ol style="list-style-type: none"> <li>appears (or is likely to appear) as a witness before the Children's Court;</li> <li>is involved (or likely to be involved) in any capacity in any non-court proceedings;</li> <li>with respect to whom proceedings in the Children's Court are brought;</li> <li>who is (or is likely to be) mentioned in any non-court or Children's Court proceedings; or</li> <li>who is the subject of certain reports.</li> </ol> <p>ACT legislation restricts publication of an account or report of a Children's Court proceeding if it discloses the identity of a child or a family member, or allows their identity to be ascertained (s 61A).</p>

Issue	Australian Laws	Comments
		<p>The <i>Child Protection Act 1999</i> (Qld) restricts publications identifying a child as being the subject of an investigation or order relating to harm or risk of harm under that Act, or as being harmed by a parent or family member (s 189). For sexual offence cases, there is a prohibition on reports identifying any child witness or victim unless the court orders otherwise (s 193(1)).</p> <p>Under the <i>Children's Protection Act 1993</i> (SA), it is an offence to publish a report of proceedings in which a child is alleged to be at risk or in need of care or protection, if the court prohibits any such report, or if the report publishes any identifying information of any child concerned in the proceedings, as a party or witness (s 59A).</p> <p>The <i>Children, Youth and Families Act 2005</i> (Vic) prohibits the publication of a report of Children's Court Proceedings without the permission of the President if it contains any identifying information of the venue, a child or other party to the proceedings, or a witness (s 534).</p> <p>In Western Australian, reports are prohibited of Children's Court proceedings (or appeal proceedings), or any proceedings on appeal from that court, which contain any identifying information of a party, a witness or an alleged victim of an offence.</p> <p>In Tasmania, a person must not publish a decision of, any report relating to, or anything said or done at a family conference under the <i>Children, Young Persons and their Families Act 1997</i> (Tas). Under the <i>Magistrates Court (Children's Division) Act 1998</i> (Tas), a person must not (without the Court's permission) publish a report of proceedings of the Court if the report identifies, or contains information, that may lead to identification of a child the subject of, a party to or a witness in proceedings.</p>

Adoption proceedings	<p><i>Adoption Act 1993</i> (ACT), ss 4, 96, 97, 112, 112 and 114</p> <p><i>Adoption Act 2000</i> (NSW), ss 3, 119, 178, 179, 180, 186, 194 and 205</p> <p><i>Adoption of Children Act 1994</i> (NT), ss 3, 70, 71, 72 and 79</p> <p><i>Adoption of Children Act 1964</i> (Qld), ss 6, 44, 45, 58 and 59</p> <p><i>Adoption Act 1988</i> (SA), ss 4, 24, 31, 32 and 36</p> <p><i>Adoption Act 1988</i> (Tas), ss 3, 93, 100, 101, 108 and 109</p> <p><i>Adoption Act 1984</i> (Vic), ss 4, 83, 107, 120 and 121</p> <p><i>Adoption Act 1984</i> (WA), ss 4, 84, 123, 124, 127 and 133.</p>	<p>Adoption hearings are always held in closed court and court records of the proceedings are not open to public inspection.</p> <p>In all States and Territories, it is an offence to publish without the authority of the court (and, in Victoria, without the consent of the identified party), in relation to adoption proceedings, the name or any other matter likely to identify an applicant for adoption, the child or the parent or guardian of the child.</p> <p>It is an offence to publish any matter indicating that a person wishes to have a child adopted, that a person wishes to adopt a child, or that a person is willing to make arrangements with a view to adoption. In New South Wales, the prohibition is specifically applied to online advertising.</p>
Coroners' powers	<p><i>Coroners Act 1997</i> (ACT), s 40.</p> <p><i>Coroners Act 1980</i> (NSW), ss 44 and 45</p> <p><i>Coroners Act 1993</i> (NT), ss 3, 42 and 43</p> <p><i>Evidence Act 1939</i> (NT), ss 4 and 57</p> <p><i>Coroners Act 2003</i> (Qld), ss 41 and 43</p> <p><i>Evidence Act 1929</i> (SA), ss 4, 5, 68, 69 and 69A</p> <p><i>Coroners Act 1995</i> (Tas), ss 56 and 57</p> <p><i>Coroners Act 1985</i> (VIC), ss 47 and 58</p> <p><i>Coroners Act 1996</i> (WA), ss 45 and 49</p>	<p>In some States, a coroner has power to order that coronial proceedings be held in closed court. The basis on which the coroner may make such an order is variously expressed in the legislation, including by reference to the interests of the administration of justice (ACT), national security (NSW, NT and Tas) and the interests of justice, the public or a particular person (Qld).</p> <p>In most jurisdictions, a coroner has power to order that there be no publication of some or all the evidence or of the coroner's report. Failure to comply with such an order is an offence.</p>

Juries	<p><i>Juries Act 1967</i> (ACT), s 42C</p> <p><i>Jury Act 1977</i> (NSW), ss 68, 68A and 68B</p> <p><i>Juries Act (NT)</i>, ss 49A and 49B</p> <p><i>Jury Act 1995</i> (Qld), s 70</p> <p><i>Juries Act 2000</i> (Vic), ss 77 and 78</p> <p><i>Juries Act 1957</i> (WA), ss 56A, 56B, 56C, 56D, 56E and 57.</p>	<p>In the ACT and Western Australia, it is an offence to publish information that identifies or is likely to identify a person as a juror or particular proceedings.</p> <p>In Victoria, it is an offence to publish any information or image that identifies or is capable of identifying a person attending a jury service.</p> <p>In NSW, it is an offence to publish any information likely to lead to identification of a juror or former juror (except with the former juror's consent).</p> <p>In the Northern Territory, it is an offence to publish or otherwise disclose identifying information about a juror, during the course of proceedings, except with leave of the court.</p> <p>In Western Australia, it is a contempt to take or publish any photo or other likeness of any juror empanelled for any proceedings.</p> <p>In some States and Territories, the solicitation of information from jurors and publication of jury deliberations is prohibited.</p>
Statements that cannot be proved true, and which adversely affect a person's reputation or cause others to shun or avoid him or her	<p><i>Defamation Act 2005</i> (NSW)</p> <p><i>Defamation Act 2005</i> (Qld)</p> <p><i>Defamation Act 2005</i> (SA)</p> <p><i>Defamation Act 2005</i> (Tas)</p> <p><i>Defamation Act 2005</i> (Vic)</p> <p><i>Defamation Act 2005</i> (WA)</p> <p><i>Civil Law (Wrongs) Act 2002</i> (ACT)</p> <p><i>Defamation Act 2005</i> (NT)</p>	<p>Uniformity was achieved in 2006.</p> <p>A decision was made in relation to the 2006 reforms to adopt the longstanding common law position that truth alone is a defence.</p> <p>A range of defences other than truth are available in circumstances in which it is important to ensure freedom of communication even where people get it wrong.</p>
Online behaviour which is menacing harassing or offensive	<p><i>Criminal Code Act 1995</i> (Cth) s 471.12</p>	<p>It is an offence to use a carriage service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.</p> <p>Publication of private facts may sometimes fall within this category.</p>

Monitoring or recording of private conversations or activities	<p><i>Workplace Surveillance Act</i> 2005 (NSW)</p> <p><i>Listening Devices Act</i> 1984 (NSW)</p> <p><i>Telecommunications (Interception) Act</i> 1979 (Cth)</p> <p><i>Listening Devices Act</i> 1992 (ACT)</p> <p><i>Surveillance Devices Act</i> 2000 (NT)</p> <p><i>Surveillance Devices Act</i> 1999 (Vic)</p> <p><i>Surveillance Devices Act</i> 1998 (WA)</p> <p><i>Listening Devices Act</i> 1991 (Tas)</p> <p><i>Invasion of Privacy Act</i> 1971 (Qld)</p> <p><i>Listening and Surveillance Devices Act</i> 1972 (SA)</p>	<p>Each of these Acts prohibit use of a device to listen to, record or monitor certain private conversations or activities. All of them cover listening devices. Some extend to photography/video, tracking and/or data surveillance. In each case, the range of activities extend beyond "spy" like activities to activities such as use of an ordinary tape recorder to record a private conversation. All contain exceptions where the parties to the conversation or activity consent.</p> <p>All of these Acts contain prohibitions on use and disclosure of information obtained through the illegal use of a device.</p>
Spent Convictions	<p>Part VIIC of the <i>Crimes Act 1914</i> (Cth), the Commonwealth "Spent Convictions Scheme"</p> <p><i>Criminal Records Act</i> 1991 (NSW)</p> <p><i>Criminal Records (Spent Convictions) Act</i> (NT)</p> <p><i>Criminal Law (Rehabilitation of Offenders) Act</i> 1986 (Qld)</p>	<p>These Acts contain restrictions on use and disclosure of certain old ("spent") convictions.</p> <p>Part VIIC of the <i>Crimes Act 1914</i> (Cth) implements the Commonwealth "Spent Convictions Scheme".</p> <p>In both Queensland and the Northern Territory, it is an offence to disclose a spent conviction without the permission of the convicted person. In New South Wales it is an offence to disclose information concerning a spent conviction without lawful authority.</p>
Protection of information about individuals (including information which is not confidential)	<p><i>Privacy Act</i> 1988 (Cth) (National Privacy Principles for organisations, and Information Privacy Principles for Commonwealth Agencies)</p>	<p>The Privacy Act regulates collection, use, disclosure and storage of personal information in the private sector through 10 "National Privacy Principles" (NPPs). It also requires organisations disclose information about their handling of privacy practices, and handling of personal information, and to give individuals access to information about themselves.</p>

		Acts in the course of journalism by media organisations are governed by separate privacy standards which the organisations must commit to in order to be exempt from the NPPS.
Protection against inappropriate disclosure by media of private facts	Privacy Standards required by media exemption in the <i>Privacy Act 1988</i> (Cth)	This is a very important source of protection, and provides a cheap and effective means of redress.
State and Territory Government Information privacy	<p><i>Privacy and Personal Information Protection Act 1998</i> (NSW)</p> <p><i>Information Privacy Act 2000</i> (Vic)</p> <p><i>Personal Information Protection Act 2004</i> (Tas)</p> <p><i>Information Act 2002</i> (NT)</p> <p>Various specific prohibitions on disclosure applicable to particular agencies. For example, the <i>Australian Security Intelligence Organisation Act 1979</i> (Cth), s 18.</p>	<p>In Queensland, a privacy scheme (Information Standard 42) and series of statutes impose privacy obligations on state government agencies and most statutory corporations. The scheme, based on the federal Information Privacy Principles, took effect in September 2001 and includes Information Standards and Privacy Guidelines which apply across public sector operations.</p> <p>In Western Australia, the <i>Information Privacy Bill 2007</i> is currently under consideration by the legislature, and received a second reading speech on 28 March 2007. Additionally, numerous statutes regulate privacy of personal information, including <i>Freedom of Information Act 1992</i>, <i>State Records Act 2000</i>, <i>Spent Convictions Act 1988</i>, <i>Surveillance Devices Act 1998</i>, <i>Telecommunications (Interception) Western Australia Act 1996</i>.</p> <p>In South Australia, the Government has issued an administrative instruction requiring its government agencies to generally comply with a set of Information Privacy Principles and has established a privacy committee.</p> <p>Unauthorised disclosure by a person of any information or matter that has come into that person's knowledge or possession by reason of him or her being, or having been, a staff member or contractor of ASIO is an offence punishable by up to 2 years imprisonment.</p>

Telecommunications privacy (general)	<p>Part 13 of the <i>Telecommunications Act 1997</i> (Cth)</p> <p><i>Telecommunications (Interception and Access) Act 1979</i> (Cth)</p>	<p>By operation of s 303B, Part 13 of the <i>Telecommunications Act 1997</i> (Cth) effectively replaces National Privacy Principle 2 in relation to telecommunications carriers, carriage service providers, contractors and employees.</p> <p>The <i>Telecommunications (Interception and Access) Act 1979</i> (Cth) prohibits the interception of communications passing over a telecommunications system and prohibits access to stored communications (i.e. email, SMS and voice mail messages stored on a carrier's equipment) except where authorised in specified circumstances.</p>
Health Privacy	<p><i>Health Records and Information Privacy Act 2002</i> (NSW)</p> <p><i>Health Records Act 2001</i> (Vic)</p> <p><i>Health Records (Privacy and Access) Act 1997</i> (ACT)</p>	<p>These Acts protect the privacy of health information in both the private and the public sectors. They are subject to media exemptions which are in similar but not identical terms to that in the Privacy Act.</p>



## CHAPTER 8

### THE JUSTICE SYSTEM

#### ANNEXURE C

#### **Comparisons of suppression orders in the UK, the US, Canada and New Zealand.**

##### *New Zealand*

In New Zealand, the rule is that hearings of both civil actions and criminal proceedings must take place in public. One element of this rule is the media's right at common law to report on court proceedings, although this right has been limited by statute in New Zealand. This right of the media is part of the right of freedom of expression contained in section 14 of the New Zealand *Bill of Rights Act* 1990, which provides:

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

Despite these principles, there are statutes in New Zealand which restrict publicity in relation to certain types of proceedings.

##### **Criminal trials**

##### **8.4.1.1. Right to clear a court and to prohibit publication**

In criminal proceedings a court may make an order:

- (A) that any or all persons (other than the informant, any member of the police, the defendant, any counsel engaged in the proceedings and any court officer) leave the courtroom for the whole or part of proceedings;
- (B) forbidding the publication of the name of any witness, or any particulars likely to lead to the identification of a witness; and/or
- (C) forbidding the publication of the whole or any part of the evidence adduced or the submissions made in a trial.<sup>1</sup>

According to Burrows and Cheer, non-publication orders are relatively frequently made, but the reasons for such orders must be compelling and the orders must be no wider than necessary (John Burrows and Ursula Cheer, *Media Law in New Zealand* (4th ed. 1999) 233). Non-publication orders may be permanent or only for a certain period, in which case they can be renewed (s138(4) of the *Criminal Justice Act* 1985 (NZ)). In addition, an order can be reviewed by a court at any time and a member of the news media is taken to have sufficient interest in the matter to apply for a review. Anyone who breaches a non-publication order is liable to a fine of up to \$1000<sup>2</sup> and a breach of an order to clear a court is a contempt of court.<sup>3</sup>

#### 8.4.1.2.Special rules in cases of sexual nature

In criminal cases of a sexual nature, the complainant's evidence is given in the form of a written statement. The complainant is not examined or cross-examined on the evidence unless he or she wishes to give oral evidence, or unless the judge orders that he or she do so for special reasons. When the complainant gives evidence at the trial, no one is to be present in the court room except certain persons, including the judge and jury, the prosecutor, the lawyers, the defendant, any accredited news media reporters and some others (s185(C)(2) *Summary Proceedings Act* 1957 (NZ)). If the court considers that the interests of the complainant require it, the court may prohibit the publication of any report giving details of the criminal acts involved (s185(D) *Summary Proceedings Act* 1957 (NZ)).

#### 8.4.1.3.Suppression of names—general

There are blanket prohibitions in New Zealand applying generally to criminal proceedings. It is an offence to publish in a report of court proceedings the names of the following persons, or particulars likely to lead to their identification:

- (A) a witness under 17 years of age in criminal proceedings (s139A *Criminal Justice Act* 1985 (NZ));
- (B) a person upon or with whom it is alleged that certain sexual offences were committed unless they are over 16 years of age and the court allows the publication (s139(1) *Criminal Justice Act* 1984 (NZ));
- (C) a person accused or convicted of incest or sexual intercourse with a girl under his care or protection (s139(2) *Criminal Justice Act* 1985 (NZ));
- (D) a person in respect of whom an application has been made for an order to authorise the taking of a blood sample unless the judge allows publication of the person has been charged with the offence (ss14 and 19 *Criminal Investigations (Blood Samples) Act* 1995 (NZ));
- (E) in cases of serious crimes, the Commissioner of Police may file a certificate in court to prevent the provision in court of the name and address details of any undercover police officer who gives evidence (ss108 and 109 *Evidence Act* 2006 (NZ)); and
- (F) it is an offence to publish the fact that any person is a member of the SIS, such that if an SIS member gives evidence in court, the person's identity and membership of the SIS must not be linked (s13A *New Zealand Security Intelligence Service Act* 1969).

For most of these provisions, a person who publishes information in contravention of the provision is liable to a fine or, in some cases, imprisonment.

#### 8.4.1.4.Discretionary suppression

In exceptional cases in proceedings where a person is charged with an offence to be proceeded against by indictment, witnesses may be granted anonymity in proceedings. If a court makes a witness anonymity order, no person may publish, in any report or account relating to the proceeding, the name, address or occupation of the witness, or any other particulars likely to lead to the witnesses' identification (s111(d) *Evidence Act* 2006 (NZ)). A person who knows that a witness anonymity order is in place and

intentionally contravenes the order is liable for up to seven years in prison. A non deliberate contravention carries a penalty of up to \$2000 for an individual or \$10,000 for a corporation.

In addition, courts have a very general power under s140 of the *Criminal Justice Act* 1895 to make orders prohibiting the publication, in any report or account relating to any proceedings in respect of an offence, of the name, address, or occupation of the person accused or convicted of the offence, or of any other person connected with the proceedings, or any particulars likely to lead to any such person's identification. Under s140(5), a person who breaches or attempts to breach such an order is liable for a fine of up to \$1000.

#### 8.4.1.5. Particular cases

Courts also have powers in particular cases to suppress the publication of certain information. A small sample of these include:

- (G) restrictions regarding the publication (in relation to a particular court case) of toxic substances and controlled drugs featured in the case (s21 *Misuse of Drugs Act* 1975);
- (H) the publication of matter that is objectionable under the *Films, Video and Publications Classification Act* 1993 and arguably it is not defence to plead that the matter was published as part of an accurate court report. This could cover particularly detailed evidence in a sex case; and
- (I) in reviewing a decision to deprive a person of citizenship, the High Court may sit in private or prohibit the publication of evidence if it considers this to be desirable due to the confidential nature of any evidence submitted (s19(8) *Citizenship Act* 1977).

#### Civil cases

In New Zealand, the District Court and the High Court may sit behind closed doors if absolutely necessary for the administration of justice. This power is exercised only in exceptional cases, for example where cases concern secret processes or commercially sensitive matters where publicity would destroy the whole subject matter (e.g. *Polly Peck International plc v Nadir* [1991] TLR 505), and cases during a time of uprising where admission of the public could result in riots (e.g. *R v Lewes Prison Governors ex parte Doyle* [1917] 2 KB 254). There is uncertainty in New Zealand as to whether reports of such matters may be published. Some authority suggests reports of these cases are prohibited only to the extent necessary to achieve the purpose for which a matter is heard behind closed doors (*Scott v Scott* [1913] AC 417) whereas other authorities hold there is no authority to publish reports of such matters at all (*Alliance Perpetual Building Society v Belrum Investments Ltd* [1957] 1 WLR 720).

The common law in New Zealand allows limitations to be placed on the reporting of matters in open court. At common law, courts have a limited inherent power to order that names of parties and witnesses not be published. It is also fairly clear in New Zealand that courts have an inherent power to order that details of evidence not be published. For example, in a case involving very personal evidence about a sex change, a New Zealand court prohibited publication by the media of the person's

name and parts of the final judgment (*Re T* [1975] 2 NZLR 449). The New Zealand High Court and Family Court also have jurisdiction to make orders protecting the interests of a ward of the court.

### *United States*

In the United States, suppression orders are referred to as “gag orders”. The First Amendment in the United States Constitution guarantees freedom of speech as well as freedom of the press, and this statutory right has a strong influence on the scope of gag orders imposed on the media and others. Generally, courts can only order parties to a case not to comment on it and do not have authority to stop unrelated reporters from reporting on a case. Since 1931, the US Supreme Court has repeatedly found that attempts to censor the media are presumed unconstitutional since they are an infringement on First Amendment rights (*Near v Minnesota*, 283 US 697 (1931); *New York Times v United States*, 403 US 713 (1971)).<sup>4</sup>

#### (C) Gag orders and controls on trial participants

In the United States, it is within a court's jurisdiction to impose a gag order on participants in a trial to prohibit communication between trial participants and the press.

In criminal law proceedings where the right of the accused to a fair trial is asserted, a court may only impose a gag order on trial participants when:

- 8.4.1.6. there is a clear or serious threat to the fairness of the trial;
- 8.4.1.7. less restrictive alternatives are not adequate to mitigate the harm; and
- 8.4.1.8. the gag order would effectively prevent the threatened danger (*Pedini v Bowles*, 940 F.Supp1020 (N.D. Tex. 1996); *US v Hill*, 893 F.Supp. 1039 (N.D. Fla. 1994); *South Blend Tribune v Elkhart Circuit Court*, 691 N.E.2d 200, 26 Media L. Rep. (BNA) 1694 (Ind. Ct. App. 1998)).<sup>5</sup>

A gag order in civil proceedings will only withstand constitutional scrutiny where a court makes findings supported by evidence that:

- (i) an imminent and irreparable harm to the judicial process will deprive litigants of a just resolution to their dispute; and

- 8.4.1.9. the judicial action represents the least restrictive means to prevent that harm (*Davenport v Garcia*, 834 S.W.2d 4 (Tex. 1992)).<sup>6</sup>

There are many examples where courts have restrained trial participants from speaking to the press to prevent prejudicing court proceedings and it is generally accepted that it is within a court's discretion to do so. For example, a trial court possessed authority and jurisdiction to enter a pre-trial gag order on trial participants in connection with the criminal prosecution of state employees for the death of a child at a state training school. There was extensive and extremely sensational publicity in the months following the child's death, and some prominent state and national figures had made potentially prejudicial remarks regarding the case. The incident was also the subject of government and public debate, and the court considered that the fair trial

rights of the two state employees criminally charged were vulnerable to publicity (*Sioux Falls Argus Leader v Miller*, 2000 SD 63, 610 NW2d 76 (SD 2000)).<sup>7</sup>

Judges may also be able to control how the members of the media contact trial participants. For example, an Arizona court ordered that all court personnel, counsel, witnesses and jurors refrain from speaking directly to the media during the trial. Contact with the media was ordered to occur through a court-appointed liaison officer (*KPNX Broadcasting Co v Superior Court*, 678 P.2d 431 (Ariz. 1984)).<sup>8</sup>

### **Gag orders on the media**

A clear distinction is made between gag orders imposed on participants in a trial and restrictions imposed directly on the media. Generally, the former are considered constitutional and the latter are considered unconstitutional, however there are exceptions to this position. For example, courts have prohibited interviews of jurors after a trial has ended. The New Jersey Supreme Court affirmed a decision barring the media from interviewing discharged jurors where a murder trial ended in a hung jury. The court prohibited media interviews of the discharged jurors on any topic and prohibited jurors who wanted to speak to the media from doing so, but the duration of the gag order was limited until after the return of the verdict in the second trial. The Supreme Court considered that media interviews may give insight into the jury's deliberations and advantage the prosecution at the retrial (*State v Neulander*, 801 A.2d 255 (N.J.2002) cert. denied *Philadelphia Newspapers Inc v New Jersey*, 123 S. Ct. 1281 (2003)).<sup>9</sup>

The US Supreme Court has also recognised that publication of some information may be restrained to protect national security. Courts have recognised that restraints on speech before publication may be imposed where the activity restrained poses a clear and present danger, or a serious and imminent threat, to the administration of justice (*Wood v Georgia*, 370 US 375, 385 (1961)). Generally however US courts are reluctant to issue orders imposing restraints before publication, especially where the justification for the orders is that the material might be libellous or invade someone's privacy.<sup>10</sup>

### **Censorship of information revealed in open court**

Generally, information cannot be censored to the extent it is revealed in open court. For example, a court cannot restrain the press from publishing the identity of jurors who are identified in open court selection proceedings since that information forms part of the public record (*State v Neulander*, 801 A.2d 255 (N.J. 2002)).

### **Statutory restraints**

Some US states have statutes which prohibit the publication of names of rape victims and members of the media which break these laws are potentially subject to fines and imprisonment.<sup>11</sup> Supreme Courts in some states, such as Georgia, have found statutes prohibiting the media from naming or identifying rape victims to be unconstitutional (*Dye v Wallace*, 553 S.E.2d 562 (Ga. 2001), while Supreme Courts in other states, such as South Carolina, have held that such statutes are not constitutional on their face (*Dorman v Aiken Communications*, 398 S.E.2d 687 (SC 1990)).<sup>12</sup>

## *Canada*

In Canada, freedom of expression is enshrined in section 2(b) of the Canadian Charter, which guarantees “everyone” the “fundamental freedom” of “thought, belief, opinion and expression, including freedom of the press and other media of communication”.

A principle of openness is one of the hallmarks of the Canadian criminal justice system and, as a rule, all proceedings take place in open court. The names of witnesses, victims and accused persons in proceedings are generally made public. There are instances in which the law makes exceptions, however these are rare and avoiding mere embarrassment or inconvenience are not considered to be sufficient reasons for making exceptions.

In Canada, suppression orders are referred to as “publication bans”.

### (D) Canadian statute law

Some Canadian statutes impose restrictions on free speech and free press. Under the Canadian Criminal Code R.S.C 1985, c. C-46 for example, there are several restrictions on the freedom of Canadians to speak publicly about criminal proceedings. These include, without limitation:

- 8.4.1.10. before the commencement of the taking of evidence at a preliminary inquiry, a judge may order that evidence taken at the inquiry must not be published in any way before the accused is discharged or, if the accused does stand trial, before the trial is ended. Any person who fails to comply with such a order is guilty of an offence punishable on summary conviction (s 539);
- 8.4.1.11. a judge may order that any information that could identify the complainant or a witness in proceedings for certain offences must not be published, broadcast or transmitted in any way. The relevant offences include (without limitation) rape, indecent assault, common assault, buggery or bestiality, and sexual intercourse with a female under the age of 16 years (s 486.4(1));
- 8.4.1.12. a judge may make an order directing that any information that could identify the victim or witness in proceedings shall not be published if the judge is satisfied that the order is necessary for the "proper administration of justice" (s 486.5). In deciding whether to make such an order, the judge must consider a wide range of factors set out in s 486.5(7) including the right to a fair and public hearing, whether there is a real and substantial risk that the victim or witness would suffer significant harm if their identity were disclosed, society's interest in encouraging the reporting of offences, and several other factors;
- 8.4.1.13. a judge must order a publication ban to protect the identity of all victims of sexual offences and witnesses of sexual offences who are less than 18 years old.

Publication bans to protect the identity of sexual assault victims and witnesses have been part of the Criminal Code since 1988. The common law has also recognised that judges may protect the identity of any victim or witnesses in appropriate cases.<sup>13</sup>

For completeness, we also note that there are other statutory publication restrictions in Canada. For example, the *Youth Criminal Justice Act* limits what can be said about proceedings involving young persons who are in conflict with the criminal justice system.

### **Common law**

In 1995, the Supreme Court of Canada in *Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 835 considered the common law position regarding publication bans. In this case, the CBC challenged a publication ban which prevented it from airing a mini series which was a fictional account of sexual abuse of children in a Catholic institution.

The publication ban was originally sought by former and present members of a Catholic religious order who were charged with abusing young boys in their care at training schools. At the time the publication ban was made, the trials of the members of the religious order were being heard or were scheduled to be heard. The court which heard the original application and made the publication ban also granted an injunction prohibiting publication of the fact of the application, or any material relating to it.

The court in *Dagenais v Canadian Broadcasting Corporation* held that the common law rule on publication bans conflicted with the Charter values and that it should be varied to enable the court to consider both the objective of a publication ban and the proportionality of the ban's effect on protected Charter rights. The court adopted the rule that a publication ban can only be issued if:

- the publication ban is necessary, in that it relates to an important objective that cannot be achieved by a reasonably available and effective alternative measure;
- the proposed ban is as limited as possible; and
- there is proportionality between the positive effects of the ban and the harm to free expression.

The publication ban in that case was found not to be supported under the common law. Reasonable alternative measures were available and the initial ban was far too broad—it prohibited broadcast throughout Canada and even banned reporting on the ban itself.

This case indicates the elements that need to be satisfied before a publication ban is ordered in Canada.

## *United Kingdom*

Where a trial is public, there is a general right to publish a fair and accurate report of the proceedings contemporaneously and in good faith. Courts do not have inherent jurisdiction to prohibit or postpone the publication of a report of proceedings.<sup>14</sup>

However pursuant to section 4(2) of the *Contempt of Court Act* 1981, a court may order that the publication of the report, in whole or in part, be postponed for a period of time sufficient to avoid a substantial risk to the administration of justice in the proceedings, or other proceedings which are pending or imminent. Such an order must be expressed precisely and should be in written form: *Practice Direction (Criminal Proceedings: Consolidation) Act*.<sup>15</sup> The court has no common law power to make such an order: *Independent Publishing Co Ltd v A-G of Trinidad and Tobago*; *Trinidad and Tobago News Centre Ltd v A-G of Trinidad and Tobago*.<sup>16</sup> Also, under section 11 of the *Contempt of Court Act* 1981, the court may prohibit publication of the name of a person who has a connection with the proceedings or of any matter with respect to the proceedings. If a person breaches such an order, they will be liable for contempt.<sup>17</sup>

A “person aggrieved”, which may include a newspapers, television and radio broadcasters,<sup>18</sup> may appeal, with leave, a restriction on publication in respect of a trial on indictment, to the Court of Appeal. The decision of that court is final.

In *Re S (A Child) (Identification: Restriction on Publication)*<sup>19</sup> the court found that it would have jurisdiction to restrict publication of proceedings to protect a child who is not a victim, defendant or witness to the proceedings, pursuant to Article 8 of the European Convention on Human Rights (ECHR),<sup>20</sup> which is included in Schedule 1 of the *Human Rights Act* 1998. However the court would also have to consider Article 10 of the ECHR, which protects freedom of expression, and which is equally important.

In *Re S*, a newspaper was not restrained from publishing the name of a mother accused of murdering one of her children, even though the applicant had argued that such a restriction was necessary to protect the privacy of the mother's other child. However the court did prohibit publication of the name of the defendant and victim in order to protect the defendant's children in *Re W (Children) (Identification: Restrictions on Publication)*.<sup>21</sup>

There is a raft of statutory restrictions which a court may apply to reporting of proceedings with respect to sexual offences or which involve children or young people. The court may also be empowered to order restrictions at certain stages of serious, complex or long cases (including fraud and terrorism cases).



## Civil proceedings

In civil proceedings, various statutory restrictions may apply in relation to publication of those proceedings, including in relation to:

- 1) “indecent” matter or “indecent medical, surgical or physiological details”, the publication of which would be calculated to injure public morals (*Judicial Proceedings (Regulation of Reports) Act 1926 s 1(1)(a)*);
- 2) marriage (for example, proceedings which concern dissolution or issues of nullity) *Judicial Proceedings (Regulation of Reports) Act 1926 s 1(1)(a)*; *Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968*;
- 3) family proceedings heard before a magistrates' court (*Magistrates Court Act 1980 s 71(1)*); and
- 4) proceedings involving children, where publication is calculated to lead to the identification of the child in question (*Children and Young Persons Act 1933 s 39(1)*).

Where proceedings are conducted in private, publication of a report on such proceedings will not automatically be a contempt of court except in certain specific circumstances, such as where the proceedings relate to the maintenance or upbringing of a minor, an issue under the *Mental Health Act 1959*, issues of national security, or confidential information and trade secrets.

## Criminal proceedings

Various statutory restrictions apply to the reporting of criminal proceedings, including in relation to:

- 1) committal proceedings (to the matters set out in the *Magistrates Courts Act 1980*);
- 2) certain preparatory proceedings in relation to fraud (as set out under the *Criminal Justice Act 1987*);
- 3) proceedings involving sexual offences where publication could lead to identification of the alleged victim (discussed below);
- 4) proceedings involving children or young people, where publication could lead or is likely to lead to identification of the child in question or where publication is of the picture of the child (as discussed below);
- 5) proceedings in relation to which publication might be made of indecent matters, where publication is calculated to injure public morals; and
- 6) some in camera proceedings.
- 7) Some of the specific statutory regimes are discussed below.

## Sexual Offences

The victim of various alleged sexual offences is entitled to have her or his identity withheld under the *Sexual Offences Act 2003*. Where a victim alleges that a sexual offence has been committed against her or him, no matter may be published which may lead members of the public to identify the alleged victim, during his or her lifetime, until a person has been accused of the offence: *Sexual Offences (Amendment) Act 1992 s 1(1)*. A "publication" is defined to include any speech, writing, relevant

program or other communication in whatever form, which is addressed to the public at large or any section of the public: *Sexual Offences (Amendment) Act 1992* s 6(1). However the court may order that restriction on publication of the alleged victim's name be lifted where it is conducive to the conduct of the trial, where the restriction is substantial or unreasonable or where it is in the public interest to do so: *Sexual Offences (Amendment) Act 1992* s 1(3)(b).

The sexual offences to which restrictions on publication may apply include:

- sexual assault;
- rape;
- sexual assault or rape involving a child;
- abuse of a position of trust;
- familial child sex offences;
- offences against mentally disordered persons;
- abuse of children through prostitution or pornography;
- trafficking;
- exposure; and
- voyeurism.<sup>22</sup>

### **Criminal proceedings involving children and young people**

By way of further illustration, there is a range of specific UK law on reporting restrictions in relation to youth court proceedings. By way of illustration, any court, in relation to any proceedings, may make a non-publication order:

- restricting a newspaper from reporting on the proceedings in a way which “may reveal the name, address, or school, or include any particulars calculated to lead to the identification, of any child or young person”;<sup>23</sup> concerned in the proceedings (whether the proceedings have been brought by or against the person or the person is a witness in the proceedings); and
- providing that no picture may be published in any newspaper as being or including a picture of any child or young person concerned in the proceedings.<sup>24</sup>

The onus is on the applicant to show why the order to restrict publicity should be made.<sup>25</sup> The penalty for contravention of these requirements (for example, by any proprietor, editor or publisher of a newspaper) is liability to a fine (subject to a statutory maximum amount) on summary conviction. In proceedings defined as youth court proceedings under the *Children and Young Persons Act 1933*, courts are required to restrict publication in the manner outlined in paragraphs (i) and (ii) above. They can, however, determine, in their discretion, to lift such restrictions where it is in the public interest to do so in certain categories of proceedings, such as in relation to the prosecution or conviction of an offender of an offence. Young people lose the benefit of the restrictions once they turn 18.<sup>26</sup>

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<sup>1</sup> s 138(2) of the *Criminal Justice Act 1985* (NZ)

<sup>2</sup> s 138(7) of the *Criminal Justice Act 1985* (NZ)

<sup>3</sup> s 138(9) of the *Criminal Justice Act 1985* (NZ)

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<sup>4</sup> *The First Amendment Handbook: Gag Orders*, The Reporters Committee for Freedom of the Press, <http://www.rcfp.org/handbook/c06p01.html>, accessed 10 September 2007.

<sup>5</sup> Laura Dietz et al, 21A American Jurisprudence 2d, Criminal Law, at 1008 (Westlaw, updated July 2007).

<sup>6</sup> Laura Hunter Dietz et al, 75 American Jurisprudence 2d, Trial, at 138 (Westlaw, updated July 2007).

<sup>7</sup> Laura Dietz, 21A American Jurisprudence 2d, Criminal Law, 1005 (Westlaw, updated July 2007).

<sup>8</sup> *The First Amendment Handbook: Gag Orders*, The Reporters Committee for Freedom of the Press, <http://www.rcfp.org/handbook/c06p01.html>, accessed 10 September 2007.

<sup>9</sup> *The First Amendment Handbook: Gag Orders*, The Reporters Committee for Freedom of the Press, <http://www.rcfp.org/handbook/c06p01.html>, accessed 10 September 2007.

<sup>10</sup> *The First Amendment Handbook: Prior Restraints - National Security and Privacy*, The Reporters Committee for Freedom of the Press, <http://www.rcfp.org/handbook/c06p01.html>, accessed 10 September 2007.

<sup>11</sup> *The First Amendment Handbook: Prior Restraints – Statutory Restraints*, The Reporters Committee for Freedom of the Press, <http://www.rcfp.org/handbook/c06p01.html>, accessed 10 September 2007.

<sup>12</sup> *The First Amendment Handbook: Prior Restraints – Statutory Restraints*, The Reporters Committee for Freedom of the Press, <http://www.rcfp.org/handbook/c06p01.html>, accessed 10 September 2007.

<sup>13</sup> *Fact Sheet: Publication Bans*, Department of Justice Canada, [http://www.justice.gc.ca/en/news/nr/1999/doc\\_24280.html](http://www.justice.gc.ca/en/news/nr/1999/doc_24280.html), accessed 27 September 2007.

<sup>14</sup> *R v Newtownabbey Magistrates' Court, ex p Belfast Telegraph Newspapers Ltd* (1997) Times, 27 August, NI QB Crown Side.

<sup>15</sup> [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at I.3.3, CA.

<sup>16</sup> [2004] UKPC 26, [2005] 1 All ER 499, [2004] 3 WLR 611. *Ex p The Telegraph plc* cited, applied in *R v B* [2006] All ER (D) 348 (Oct), CA.

<sup>17</sup> Halsbury's Laws of England [1301] at <[http://www.lexisnexis.com/au/legal/results/docview/docview.do?risb=21\\_T2159289284&format=GNBFULL&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29\\_T2159289288&cisb=22\\_T2159289287&treeMax=false&treeWidth=0&csi=274661&docNo=5](http://www.lexisnexis.com/au/legal/results/docview/docview.do?risb=21_T2159289284&format=GNBFULL&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T2159289288&cisb=22_T2159289287&treeMax=false&treeWidth=0&csi=274661&docNo=5)> (1 October 2007).

<sup>18</sup> *R v Beck, ex p Daily Telegraph plc* [1993] 2 All ER 177 at 178–179, CA, per Farquharson LJ; and television and radio broadcasting companies (*Re Central Independent Television plc* [1991] 1 All ER 347 at 348, sub nom *Ex p Central Television plc* [1991] 1 WLR 4 at 7, CA, per Lord Lane CJ), cited in Halsbury's Laws of England [428] at <<http://www.lexisnexis.com/au/legal/results/pubTreeViewDoc.do?nodeId=TABQAA CAADAAFAAB&pubTreeWidth=618>> (1 October 2007).

<sup>19</sup> [2004] UKHL 47, [2005] 1 AC 593, [2004] 4 All ER 683.

<sup>20</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8069).

<sup>21</sup> [2005] EWHC 1564 (Admin), (2005) Times, 21 July.

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<sup>22</sup> Halsbury's Laws of England [239] at <  
<http://www.lexisnexis.com/au/legal/results/pubTreeViewDoc.do?nodeId=TABYAADAAKAAC&pubTreeWidth=404>> (1 October 2007)

<sup>23</sup> *Ex p Godwin* [1992] QB 190, sub nom *R v Crown Court at Southwark, ex p Godwin* [1991] 3 All ER 818, CA.

<sup>24</sup> *Children and Young Persons Act 1933* s 39(1)(b); Halsbury's Laws of England [1628] at  
<[http://www.lexisnexis.com/au/legal/search/runRemoteLink.do?bct=A&risb=21\\_T2159289284&homeCsi=274661&A=0.12633266354671369&urlEnc=ISO-8859-1&&dpsi=0089&remotekey1=REFPTID&refpt=0089\\_1\\_Child:HTENCY-SUBJECT\\_1628:HTENCY-PARA&service=DOC-ID&origdpsi=0089](http://www.lexisnexis.com/au/legal/search/runRemoteLink.do?bct=A&risb=21_T2159289284&homeCsi=274661&A=0.12633266354671369&urlEnc=ISO-8859-1&&dpsi=0089&remotekey1=REFPTID&refpt=0089_1_Child:HTENCY-SUBJECT_1628:HTENCY-PARA&service=DOC-ID&origdpsi=0089)> (1 October 2007).

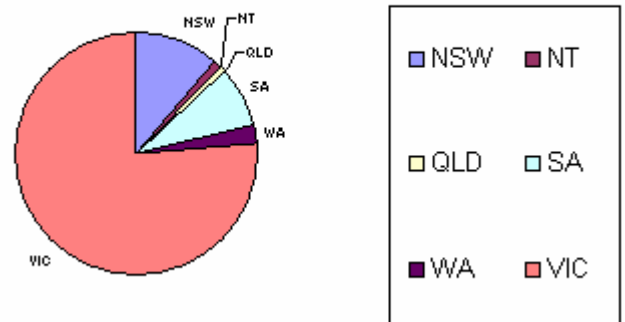
<sup>25</sup> *R v Central Criminal Court, ex p W, B and C* (2001) 1 Cr App R 7, DC.

<sup>26</sup> *DPP v Todd* [2003] All ER (D) 92 (Oct), DC; *T v DPP; North East Press Ltd* [2003] EWHC 240 (Admin), (2003) 168 JP 194.

## Suppression Order Data Analysis

State	Number of Orders
NSW	107
NT	9
QLD	6
SA	75
WA	23
VIC	697
TAS	0
<b>TOTAL</b>	<b>917</b>

Number of Suppression Orders Per State



## Creation Data for:

### New South Wales

Date of Creation	Number of Alerts Created
2004 - May	4
- Aug	6
- Sept	3
- Oct	1
- Dec	2
<b>Total for 2004</b>	<b>16</b>
2005 - Jan	2
- Feb	2
- Apr	3
- June	2
- July	5
- Aug	3

- Sep	6
- Nov	2
- Dec	1
<b>Total for 2005</b>	<b>26</b>
2006 - Jan	3
- Feb	2
- Mar	12
- Apr	3
- May	1
- Jun	5
- July	5
- Aug	2
- Sep	1
- Oct	6
- Nov	2
<b>Total for 2006</b>	<b>42</b>
2007 - Feb	5
- Mar	4
- Apr	1
- May	2
- June	5
- July	2
- Aug	2
- Sep	2
<b>Total for 2007</b>	<b>23</b>
<b>Total for NSW</b>	<b>107</b>

## **Northern Territory**

<b>Date of Creation</b>	<b>Number of Alerts Created</b>
2004 - Aug	1
<b>Total for 2004</b>	<b>1</b>
2005 - Feb	1
- Apr	1
- Oct	3
- Nov	2
- Dec	1
<b>Total for 2005</b>	<b>8</b>
<b>Total for NT</b>	<b>9</b>

## **Queensland**

<b>Date of Creation</b>	<b>Number of Alerts Created</b>
2004 - May	4
<b>Total for 2004</b>	<b>4</b>
2007 - May	1
- Aug	1
<b>Total for 2007</b>	<b>2</b>
<b>Total For QLD</b>	<b>6</b>

## **South Australia**

<b>Date of Creation</b>	<b>Number of Alerts Created</b>
2003	1
<b>Total for 2003</b>	<b>1</b>
2004 - May	1
- June	6

- July	2
<b>Total for 2004</b>	<b>9</b>
2005 - Jun	2
- July	1
<b>Total for 2005</b>	<b>3</b>
2006 - Jun	1
- Dec	1
<b>Total for 2006</b>	<b>2</b>
2007 - Feb	1
- Apr	1
- May	11
- June	13
- July	13
- Aug	6
- Sept	15
<b>Total for 2007</b>	<b>60</b>
<b>Total for SA</b>	<b>75</b>

#### **Western Australia**

<b>Date of Creation</b>	<b>Number of Alerts Created</b>
2004 - May	1
- July	1
<b>Total for 2004</b>	<b>2</b>
2005 - Nov	4
- Dec	1
<b>Total for 2005</b>	<b>5</b>
2006 - Jan	1



- Mar	1
- Apr	1
- May	2
- Oct	1
- Nov	1
- Dec	2
<b>Total for 2006</b>	<b>9</b>
2007 - Feb	3
- May	2
- Aug	2
<b>Total for 2007</b>	<b>7</b>
<b>Total for WA</b>	<b>23</b>

#### **Victoria**

<b>Date of Creation</b>	<b>Number of Alerts Created</b>
2004 - May	41
- June	11
- July	15
- Aug	22
- Sept	24
- Oct	13
- Nov	12
- Dec	13
<b>Total for 2004</b>	<b>151</b>
2005 - Jan	6
- Feb	23
- Mar	16

- Apr	22
- May	17
- June	15
- July	13
- Aug	25
- Sept	11
- Oct	26
- Nov	13
- Dec	7
<b>Total for 2005</b>	<b>194</b>
2006 - Jan	10
- Feb	20
- Mar	30
- Apr	20
- May	21
- June	16
- Jul	16
- Aug	14
- Sep	6
- Oct	27
- Nov	13
- Dec	8
<b>Total for 2006</b>	<b>201</b>
2007 - Jan	8
- Feb	20
- Mar	15
- Apr	18

- May	24
- June	18
- July	18
- Aug	18
- Sept	10
<b>Total for 2007</b>	<b>149</b>
<b>Total for VIC</b>	<b>695</b>
<b>Tasmania</b>	

<b>Date of Creation</b>	<b>Number of Alerts Created</b>
<b>Total for TAS</b>	<b>0</b>

*Source: News Limited – as of 12 September 2007*

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## CHAPTER 9

### PRIVACY AND DEFAMATION

#### EXECUTIVE SUMMARY

##### **Privacy**

Media organisations and journalists recognise privacy as a value to be respected.

It is a right recognised in both international and Australian law and both it and freedom of expression are important in a democratic society.

The concept of privacy is still evolving in the light of technological changes that present new challenges about intrusions into private life.

Even without these challenges, Australia's privacy laws are complex and confusing, with large areas of overlap, gaps and inconsistencies. They have been referred to the Australian Law Reform Commission, which should give an opportunity for analysis, discussion and debate about how best to regulate, particularly in areas associated with personal information. A final report is due in March 2008.

Proposals for some changes to aspects of the system of regulation of the media concerning compliance with privacy requirements are currently the subject of public consultation. A proposal for a law on breach of privacy is also at the discussion stage. The cause of action proposed is not directed solely towards the media, but deals with a range of invasions of privacy.

Media organisations have made or are making submissions to both the Australian and NSW Law Reform Commissions arguing that the case has not been made out for a new law on invasion of privacy, either in NSW or more broadly in Australia.

They submit that the case for such a law has not been made, that the introduction of a statutory right to privacy "would substantially alter the balance by placing fundamental restraints on the media's role in upholding freedom of communication", and that existing privacy and publication laws adequately protect privacy rights.

Confusion and uncertainty about the operation of privacy laws has led to claims that information in certain circumstances cannot be disclosed "because of the *Privacy Act*" (BOTPA).

While BOTPA may be a myth, frequent resort to this mistaken justification for refusal of access to information strongly supports the need for reform and simplification of the laws. The myth has been reality many times when privacy laws have been cited as reasons for refusing access to information, the disclosure of which would arguably be in the public interest.

The Australian and NSW LRCs have acknowledged the importance of freedom of expression and the need to retain a right to publication in the public interest.

## **Defamation**

Defamation law provides important protection against damage to reputation. The uniform laws now in place are a significant improvement in balancing freedom of expression and the right to reputation. Evidence suggests a reduction in the writs issued against media organisations since the laws came into effect in January 2006.

However, some have expressed the view that the reforms did not go far enough. The Australian Society of Authors, for instance, says:

*Australia's authors suffer more than most from censorship because we cannot afford to defend our legal rights, truncated as they are. Not one book in a thousand earns the author and publisher enough to cover the average cost of defending a defamation suit, \$140,000.*

And to the disappointment of some, Australian defamation law contains no “public figure” test of the kind available in the United States.

Australia also appears to lag behind other countries in ensuring protection against liability where matter has been published in the public interest after reasonable precautions have been taken by the publisher.

It has been suggested that it is still too early to tell whether the uniform laws, in practice, represent a better balance of the rights and interests of individuals and others who write and publish. Much will depend on the approach taken by the courts.

## CHAPTER 9

### PRIVACY AND DEFAMATION

Freedom of expression and the right to know or to be informed are subject to many qualifications. Freedom of expression must yield in some circumstances to an individual's right to privacy. The law also recognises a right to reputation through a cause of action for defamation. This chapter examines the extent to which these interests affect media freedom.

#### 9.1. Privacy

In 1948 privacy and other human rights were recognised in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR). Australia signed the ICCPR on 18 December 1972 and ratified it on 13 August 1980.

Article 12 provides: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."<sup>1</sup>

Privacy was not defined at that time. A universally accepted definition continues to elude commentators, policy makers and the courts. Privacy has many meanings, depending on the context. Recent commentary<sup>2</sup> suggests that the concept is best expressed as a range of interests of an individual that require protection. The law protects bodily privacy, the privacy of territory and privacy of communications. It has also been extended in more recent times to deal with issues associated with information about an individual and to establish standards for collection, use, disclosure and adequate security for information held by public and private sector organisations.

For more than a century, Australian courts and legislatures have rejected the concept of a legal right of privacy, in favour of common law and equitable principles which protect against public disclosure of private facts, and legislation which prevents disclosure of information in specific areas where Parliament has considered that privacy should always prevail over competing interests.

Causes of action which operate to protect particular forms of privacy and restrict the obtaining and publication of information include trespass, nuisance, confidential information, defamation and malicious falsehood and contempt.

A range of Commonwealth and State legislation governs access to people, or the publication of information relating to individual privacy. There are more than 30 such laws across Australia which prevent disclosure of categories of information such as: information obtained from illegal monitoring or recording of private conversations or activities, the identities of victims of sexual assault, and the identities of children

involved in criminal, custody or guardianship proceedings. Annexure A identifies the range of laws which protect public disclosure of private facts.

This range of legislation applying to the media is supplemented by privacy standards adopted by media organisations in relation to acts and practices in the course of journalism. Annexure B provides an overview of the privacy standards to which media organisations have publicly committed in order to trigger the media exemption of the Commonwealth Privacy Act. The media exemption is discussed further below.

The need for further protection of privacy is the subject of debate with the Australian Law Reform Commission and New South Wales Law Reform Commission recently releasing Discussion Papers which recommend the introduction of a statutory causes of action to protect privacy (albeit that the causes of action recommended differ).

These recommendations are currently the subject of public debate.

Any additional privacy cause of action is likely to have some effect on freedom of communication. Balancing these interests involves complex issues. It will be important to ensure that the impact on the free flow of information and freedom of speech is carefully considered and weighed against any benefits of an additional privacy right.

As Paul Chadwick, Victoria's first Privacy Commissioner (and a distinguished journalist, including winner of the Walkley Award for Most Outstanding Contribution to Journalism in 1997) commented:

*Privacy and media are not incompatible, though in particular circumstances they are in tension and choices must be made.*

*Privacy supports the other fundamental freedoms, including freedom of expression, just as the other freedoms mutually support privacy.<sup>3</sup>*

The law as it relates to information privacy needs to balance these sometimes competing interests.

### **9.1.1. State of privacy laws**

In 2006 the Federal Government asked the Australian Law Reform Commission (ALRC) to undertake a review of matters relating to the extent to which Australia's privacy and related laws continue to provide an effective framework for the protection of privacy in Australia. The commission published an issues paper<sup>4</sup> in 2006 and a discussion paper<sup>5</sup> in September 2007 after submissions and a round of public consultation. The discussion paper covers more than 2000 pages and includes 300 proposals for change.

The primary focus of the ALRC inquiry is information privacy: the adequacy of rules governing the collection and handling of information about an identifiable person.

The following summary of issues associated with privacy protection is drawn from the discussion paper.



The principal piece of federal legislation regulating privacy is the *Privacy Act* 1988. The *Privacy Act* applies to federal public sector organisations and to private sector bodies where they have an annual turnover in excess of \$3 million or provide health services. There are exclusions: political parties and media organisations in some circumstances, for example. State and territory privacy laws also apply, primarily to the public sector.

A wide range of other federal state and territory laws also contains provisions that have a privacy connection, either by limiting collection or publication of certain information, or relating to other conduct, such as surveillance that may constitute an unreasonable invasion of privacy.<sup>6</sup>

The ALRC has highlighted the lack of uniformity in the regulation of the handling of personal information, describing the laws as “multi-layered, fragmented and inconsistent”. The discussion paper refers to a conclusion on the state of the laws by a Senate committee.

*The Committee is greatly concerned at the significant level of fragmentation and inconsistency in privacy regulation. This inconsistency occurs across Commonwealth legislation, between Commonwealth and state and territory legislation, and between the public and private sectors. As mentioned above, the committee believes that this inconsistency is one of a number of factors undermining the objectives of the Privacy Act and adversely impacting on government, business, and mostly importantly, the protection of Australians’ privacy.*<sup>7</sup>

The commission has proposed the adoption of a common set of principles for all privacy legislation and changes to the way in which privacy is regulated.

Confusion and uncertainty about the operation of privacy laws has led to claims that information in certain circumstances cannot be disclosed “because of the *Privacy Act*” (BOTPA).

The federal Privacy Commissioner has stated that BOTPA is one of the myths frequently encountered in dealing with privacy issues:

*(BOTPA) refers to a class of complaints to my Office that are sometimes made about agencies that have apparently refused access to information without a lawful foundation or reason. Refusing information without a valid and lawful reason inconveniences individuals and harms the fabric of transparent and accountable public administration. But belief in the BOTPA myth, the assumption that personal information can never be released, also harms the efficiency of government administration.*<sup>8</sup>

While BOTPA may be a myth, frequent resort to this mistaken justification for refusal of access to information strongly supports the need for reform and simplification of the laws. The myth has been reality in many circumstances when privacy considerations have been cited as reasons for refusing access to information, the disclosure of which would arguably be in the public interest.

## Some Examples of BOTPAs

The *Sydney Morning Herald* (“Privacy no excuse to hide ‘dirt’” 24 August 2006) reported that the NSW *Privacy and Personal Information Protection Act* had been the basis of a refusal by the council of the City of Sydney to release the details of restaurants fined for breach of food handling hygiene standards. Business organisations have no rights of privacy under the Act. The refusal to release the information under the *FOI Act* was contrary to a provision in the Act that states that FOI overrides privacy law in any event.

The *Herald Sun* (“Fuel farce” 31 August 2006) reported that information about fuel use in official vehicles by members of parliament could only be released without the names because of privacy considerations.

The *Sydney Morning Herald* (“What they won't tell you” 27 June 2007) reported that the names of 10 Defence Force personnel who had been named in a report as responsible for the crash of a Sea King helicopter in Indonesia could not be released because of the *Privacy Act*. Public interest considerations, and accepted practice that people charged with an offence are named, would appear to justify disclosure of this information.

The *Daily Telegraph* (“Bail fiasco” 30 October 2006) reported that the names of people charged with offences who had failed to appear after being granted bail could not be released because of the NSW *Privacy Act*. NSW police who provided this response are not subject to the Act except in respect to administrative and educative functions.

The *Sydney Morning Herald* (“Police bury years of sex abuse shame” 5 August 2006) also reported that the NSW police refused to release (under FOI) the names of officers charged with sexual harassment for the same reason.

The ALRC Report includes proposals for clarifying the relationship between privacy legislation and the *Freedom of Information Act*. However, these do not extend to changes that would ensure that information held by government agencies about the conduct of public functions by elected representatives, public officials and others is not withheld from disclosure on privacy grounds. Privacy considerations should not prevent access to information relevant to public affairs. One commentator suggests that if laws operate to protect such information, legislative change is necessary.<sup>9</sup>

### 9.1.2. Media exemption

The *Privacy Act* (Section 7B [4]) provides that acts and practices of a media organisation in the course of journalism are exempt from the operation of the Act if the organisation is publicly committed to observe privacy standards that have been published in writing by the organisation or a body representing a class of media organisations.

A media organisation is defined as one that collects, prepares or disseminates to the public news, current affairs, information or documentaries; or commentaries and opinions on, or analyses of, such material (section 6[1]).

The phrase “in the course of journalism” has not been defined or judicially considered in Australia.

At the time the Act was passed, the reason given for the media exemption was the need to ensure an appropriate balance between the public interest in allowing the free flow of information to the public through the media, and the public interest in safeguarding adequately the handling of information. The ALRC recognises that “freedom of expression is a fundamental tenet of a liberal democracy”.<sup>10</sup>

All media sectors and major media organisations operate in accordance with codes of conduct regulated by the Australian Communications and Media Authority, or self-regulatory bodies. Separate codes exist for free commercial television, subscription television broadcasters, the Australian Broadcasting Corporation, Special Broadcasting Service, commercial radio, the Australian Press Council and for journalists through the Media, Entertainment and Arts Alliance.

The codes are not uniform and as the commission and others<sup>11</sup> point out, there are significant differences in the issues covered and major variations in enforcement provisions.

The discussion paper includes comment about the exemption from media organisations and others who either favour its continuation or who advocate change.

Media organisations and their representative bodies strongly support the exemption. They submit that it is working well and strikes an appropriate balance between the flow of information on matters of public concern and individual privacy. They submit that there are relatively few complaints to the regulatory or self-regulatory bodies, and that complaint mechanisms operate satisfactorily.

The Australian Privacy Foundation however argues that the absence of a definition of “in the course of journalism” means that the exemption is unnecessarily broad. The Foundation also submits that the current schemes have not demonstrated credible independence and objectivity and that a requirement to publish corrections is a largely ineffective sanction.<sup>12</sup>

Paul Chadwick in 2005 also commented that “media self-regulation is lacking. If media want to remain free of content regulation under the statutory schemes that are from time to time proposed—I think, misguidedly—by its critics, it would be wise for media to do more to improve its self-imposed accountability systems.”<sup>13</sup>

The ALRC concluded that with appropriate changes, the co-regulatory and self-regulatory models should remain in place. “In the ALRC’s view, freedom of expression is a fundamental tenet of a liberal democracy. Appointing an independent government body to oversee the media is a measure of last resort.... Based on the relatively low rate of privacy-related complaints, investigations and findings of breach, as well as the small number of submissions calling for a change in regulatory

model, the ALRC does not consider that the appointment of a government body, such as a Media Complaints Commission, is warranted.”<sup>14</sup>

However the ALRC has concluded that the current standards could be enhanced. The discussion paper includes proposals that the media exemption would not apply where the standards are considered inadequate. In addition media organisations would be required to show evidence of a commitment to published standards not simply express publicly to commit to a standard.

The discussion paper includes a proposal (38-1) to define “journalism” to mean the collection, preparation for dissemination or dissemination of the following material for the purpose of making it available to the public:

- a) material having the character of news, current affairs or a documentary; or
- b) material consisting of commentary or opinion on, or analysis of, news, current affairs or a documentary.

The effect would be to ensure that the primary focus of the exemption is to facilitate reporting on matters of public interest. To the extent that media organisations publish material that falls within the ambit of the general word “information”, the exemption would apply even where it is not news, current affairs or documentaries. However, content such as infotainment, entertainment and advertising would be subject to the *Privacy Act*.

### **9.1.3. Cause of action for breach of privacy**

The ALRC and in a separate but related inquiry, the NSW Law Reform Commission (NSW LRC), have both been asked to report on whether Australia or NSW should introduce a statutory cause of action where a person has suffered an unreasonable invasion of privacy.

The ALRC discussion paper (Chapter 5) and the NSW Law Reform Commission (Consultation Paper 1: Invasion of Privacy) both include a preliminary analysis of the case for a cause of action, and put forward tentative recommendations.

At common law there is no established cause of action for invasion of privacy. The High Court of Australia (*Lenah Game Meats*)<sup>15</sup> in 2001 left open the possibility that such an action would be entertained. However, only two cases in lower courts have recognised an actionable right of an individual to privacy. One (*Grosse v Purvis*)<sup>16</sup> involved an award of damages where the court found that “stalking” constituted an invasion of privacy.

The other (*Doe v Australian Broadcasting Corporation*)<sup>17</sup> currently under appeal) involved a claim for damages arising from the publication of information that identified the plaintiff, a victim of a sexual assault. The defendant had breached the Victorian Judicial Proceedings Reports Act which makes it an offence in certain circumstances to publish information identifying the victim of a sexual offence. Judge Hampel in the County Court of Victoria held that in addition to breaching this statutory duty, the defendant and two of its employees were liable for breach of confidence, and for invasion of privacy.

The NSW LRC issues paper outlines the case for its preliminary view that people should be protected in a broad range of contexts from unwanted intrusions into their private lives or affairs. The proposed cause of action is not limited to matters concerning publication by the media but addresses broader issues concerning invasion of privacy. The commission intends to develop a more precise identification of the boundaries of a possible cause of action after further community consultation.<sup>18</sup>

The issues paper lists the following reasons to support the introduction of a cause of action for invasion of privacy:

- The protection of privacy is incidental to other causes of action at common law, and legislation affords protection principally to information privacy. If a broader range of interests justifies protection, reform of the law is necessary.
- An increasingly invasive social environment may require greater protection of privacy. Technological change has raised significant new privacy concerns through potential unauthorised access to personal and business emails, medical and financial records or telephones.
- The introduction of a broadly based statutory cause of action would implement Australia's international obligations.
- The experience of other jurisdictions suggests the need for a more general protection of privacy than that now given by the law. A cause of action is recognised in other jurisdictions including United States federal law, the laws of several US states, the United Kingdom, Ireland, four provinces in Canada and New Zealand.
- Finally, in the commission's view, protection of privacy has been weakened as a result of changes in law of defamation.

Both commissions conclude that a statutory cause of action is the best means to ensure appropriate protection from unwanted intrusions into private lives or affairs. They recognise that a right to privacy is not absolute and in appropriate circumstances will have to give way to other competing rights such as freedom of expression. The public interest is an essential element in striking "the balance between privacy rights for individuals and the public's right to the free flow of information on matters of public concern".<sup>19</sup>

The commissions differ about the circumstances that could give rise to a cause of action. The NSW LRC, for the purposes of consultation, has listed seven illustrative examples including interference with home or family life; subjecting a person to unauthorised surveillance; interference with or misuse of private communications; and disclosure of embarrassing facts relating to private life.

The ALRC sees merit in examining these examples but rejects several others suggested in the NSW LRC issues paper: an unlawful attack on honour and reputation; placing a person in a false light; and using a person's name, identity, likeness or voice without authority or consent (Discussion Paper 5.72). The ALRC sees the two first mentioned matters as issues for defamation law and the last mentioned as related to a property right rather than privacy of a person.

A threshold issue for a cause of action would be for the plaintiff to establish that in the circumstances there was a reasonable expectation of privacy and that the invasion itself has been unreasonable. The proposal is that the right to take action would exist without the need for the plaintiff to establish any loss or damage.

Media organisations have made or are in the process of making submissions to both commissions arguing that the case has not been made out for a new cause of action for invasion of privacy, either in NSW or more broadly in Australia.

They argue that existing privacy and publication laws and media specific codes already protect privacy rights adequately and that the introduction of a statutory right to privacy "would substantially alter the balance by placing fundamental restraints on the media's role in upholding freedom of communication".

This, they argue, would be a particular problem in Australia, where no specific legislative protection of freedom of speech (eg. a Bill of Rights) exists to protect their role.

The balance between the free flow of information and protecting privacy is complex and will always cause tension.

However, the media argues that there are important cases where, even though individuals may not want information disclosed, it *should* be disclosed and a privacy claim should not prevent that information coming to light.

The media argues that a public figure who craves publicity should not be able to switch it off when it suits them. Further, that the fact that information may cause embarrassment to an individual is not *in itself* just reason to take it out of the public arena.

Others, including the Australian Privacy Foundation,<sup>20</sup> broadly endorse the concept of a statutory cause, and suggest that dealing with the issue in legislation and defining it in an appropriate manner is preferable to the development in a piecemeal fashion of an actionable right to privacy through the common law.

In a survey of community attitudes to privacy published by the Australian Privacy Commissioner<sup>21</sup> the major sources of concern regarding improper use or disclosure of information were the possibility of identity fraud through access to information held in databases by public and private sector organisations, businesses sending personal information overseas and security of personal information on the internet.

The survey did not include information specifically about public attitudes to use or misuse of personal information by the media.

Media organisations submit that any form of damages for invasion of privacy would be inappropriate. However, as Pearson comments, “the potential damage to an individual resulting from a privacy invasion is an important consideration”. He notes that potential damage gains scant attention in the existing media privacy codes. “This may be because much of the damage of a gross invasion of privacy might be incalculable, such as emotional scarring and other traumas.”<sup>22</sup>

The consultation processes now underway in response to the ALRC and NSW LRC proposals will provide an opportunity for public debate about the merits of these proposals, and for an objective assessment of whether a cause of action for breach of privacy should be incorporated in Australian law.

## **9.2. Defamation**

The law of defamation is recognition of the fact that freedom of expression should be constrained in some circumstances by the creation of a cause of action for injury or damage to reputation. The law seeks to establish limits that protect a person’s right to reputation unless a defence at law justifies the publication.<sup>23</sup>

New uniform defamation laws started in all Australian jurisdictions in 2006. The legislation is the *Defamation Act* 2005 in all states and territories except the Northern Territory (*Defamation Act* 2006) and the Australian Capital Territory (*Chapter 9 Civil Law (Wrongs) Act* 2002).

The laws emerged after many years of debate about general principles and recognition by governments of the unsatisfactory balance of interests and wide variations in state and territory laws.

The changes were welcomed by media organisations and publishers. The Media, Entertainments and Arts Alliance describes the changes as “a landmark achievement for Australian press freedom ... and a strong foundation for free expression”.<sup>24</sup>

Some have expressed the view that the reforms did not go far enough:

*Australia’s authors suffer more than most from censorship because we cannot afford to defend our legal rights, truncated as they are. Not one book in a thousand earns the author and publisher enough to cover the average cost of defending a defamation suit, \$140,000.*<sup>25</sup>

To the disappointment of some, Australian defamation law contains no “public figure” test of the kind available in the United States.

Under the uniform laws corporations in most instances do not have rights to sue for defamation, although other legal rights remain unaffected. The laws set out defences available to defendants, and preserve other defences that form part of established common law.

One major change is that truth alone is a defence in all jurisdictions. Previously in some, truth had not been available as a defence unless it could also be shown that a publication was justified in the public interest. “Contextual truth” is also a defence

where it can be established that published information is substantially true. A range of other defences are also available, including absolute privilege for proceedings in court or parliament and the publication of documents tabled; for the publication of various public documents; and fair reporting of proceedings of public concern. Fair comment and opinion on matters of public interest is protected. One area of continuing uncertainty is that publishers, in responding to some claims, need to demonstrate that the publication was “reasonable”, leaving a large area of discretion to the courts.

The High Court of Australia in two cases in the 1990s<sup>26</sup> found that discussion of government and political matter was eligible for protection at law because of an implied right in the constitution to freedom of discussion of such matters. The court decided that defamatory material, even if wrong, was protected where it could be established that the publication was reasonable in the circumstances. Reasonableness required the publisher to establish that there were reasonable grounds for believing the matter published was true; that proper steps were taken to verify accuracy; that the publisher did not believe the matter was untrue; and that reasonably practicable steps had been taken to seek a response from the person defamed.

A similar but expanded version of these steps is now included in the uniform defamation law, in setting out the defence of qualified privilege. The list of factors to be considered includes issues such as the extent to which matter published is of public interest, and whether it relates to the performance of public functions or activities.

There have been few cases where the defence of reasonableness has succeeded.<sup>27</sup>

In this respect Australia’s defamation laws, as interpreted by the courts, have been criticised by experts and commentators. In commenting about developments in the United Kingdom, Geoffrey Robertson QC said that freedom of expression in Australia lagged badly behind that of every other major English-speaking country.<sup>28</sup> Robertson was commenting on a decision by the House of Lords which has been praised as a landmark ruling providing a protective shield to investigative journalism. The judges held that where the topic of a media investigation was of public importance, allegations contained in a report that could not subsequently be proved true should not attract damages if the report had been published responsibly.<sup>29</sup>

Courts in Australia have generally resisted applications to restrain publication of potentially defamatory matter. Prior restraint has been described as arguably the most significant threat to freedom of the media.<sup>30</sup> In October 2006 in *Australian Broadcasting Corporation v O’Neil*, the High Court of Australia, considering an appeal from a decision to issue an injunction to prevent the broadcast of a film, emphasised that freedom of speech prevailed over any potential harm that might be suffered by a person.<sup>31</sup>

The major impact of defamation laws on freedom of expression is the high cost involved in defending any action, and previously in the potential exposure to large awards of damages. As then Justice William Deane noted:



*Potential civil liability for damages and cost is likely to represent a much more effective curtailment of the freedom of political communication and discussion than the possibility of conviction of most of the many criminal offences which are punishable by a pecuniary penalty.*<sup>32</sup>

Under the new laws damages in the usual case are limited to \$250,000 unless special circumstances prevail.

Pearson and others suggest that it is still too early to tell whether the uniform laws, in practice, represent a better balance of the rights and interests of individuals and others who write and publish. Much depends on the approach taken by the courts.

Information provided by media organisations is that the number of writs for defamation has declined since the uniform laws came into effect.

### **9.3. Other legal action**

Other causes of action are available to a person who claims damage as a result of publication of information. A right to civil action for injurious falsehood remains unaffected by changes to defamation laws. Such actions are rare because of the need to demonstrate the statement was both false and actuated by malice, as well as actual financial loss resulting from publication.

A software company, 2Clix, recently initiated action against a popular IT blogsite Whirlpool, citing 30 postings critical of its products. The statement of claim alleged the comments were “false and malicious” and sought damages for each month that the comments remained on the website.

The case was subsequently withdrawn,<sup>33</sup> but illustrates that publishers, including anyone who hosts a website, may be exposed to action for injurious falsehood if the criteria for the cause of action are satisfied, or for defamation where third party comments are posted. While the *Broadcasting Services Act* provides protection for an internet service provider, the website host has little or no protection, except to the extent that innocent dissemination could be claimed.<sup>34</sup>

There have also been attempts to use the *Trade Practices Act*, particularly the provisions relating to deceptive and misleading conduct, to take action against those who write or publish information.

In September 2007 the Federal Court dismissed an action by prominent businessman Alan Bond against journalist Paul Barry for allegations made against Mr Bond and his conduct as a consultant to Lesotho Diamonds Corporation.

Journalists and media organisations are protected against action under the *Trade Practices Act* in relation to news stories. Justice French found that the protection also extended to the publication of articles written by freelance journalists.<sup>35</sup>

As noted in Chapter 1 of this report the audit has not examined other issues concerning litigation, or the threat of litigation as a means of limiting public debate or protest through what have been called “strategic lawsuits against public participation”

(SLAPPs). These issues so far have not arisen in the context of media freedom. However, the issue appears to have important freedom of expression implications. In April 2006 140 prominent Australian barristers, solicitors, legal academics and practitioners released a statement calling for law reform to limit scope for SLAPPs:

*The increasing phenomenon of litigation against community participation in public issues by comment or action has the serious effect of intimidating the community, chilling public debate and silencing voices which should be heard in a democratic society. In addition these lawsuits against public participation create enormous stress and financial burden for the people and groups who are sued and clog our court systems with arguments which belong in political rather than legal arenas.*

*Free speech and robust public debate, together with the ability to participate in community and political activity without fear of litigation, are fundamental rights in a democratic society. The increasing and widespread use of defamation law, trade practices laws and economic torts laws against public participation must be wound back. It is no coincidence that societies where these rights of public participation are curtailed have historically been burdened with corruption, inefficiency and often disastrous decision making.<sup>36</sup>*

#### **9.4. Assessment**

Privacy is a human right, recognised in both international and Australian law. Privacy and freedom of expression are both important in a democratic society.

The concept of privacy is still evolving in the light of technological and other changes that present new challenges about intrusion into private life.

Australia's privacy laws are complex and confusing, with large areas of overlap, gaps and inconsistencies. The current reference to the Australian Law Reform Commission is providing an opportunity for analysis, discussion and debate about how best to regulate, particularly areas associated with personal information.

Media organisations and journalists recognise privacy as a value to be respected.

The proposals put forward by the Australian Law Reform Commission for some changes in the co-regulatory and self-regulatory management of privacy issues concerning the media are still the subject of debate. A final report is due in March 2008.

The proposal for a statutory cause of action for breach of privacy is also at the discussion stage. The proposal is not directed solely towards the media but involves consideration of a cause of action for a range of invasions of privacy. The Australian Law Reform Commission and the NSW Law Reform Commission have both acknowledged the importance of freedom of expression and the need to retain a right to publication in the public interest.

Defamation law provides important protections against damage to reputation. The uniform defamation laws now in place are a significant improvement in balancing freedom of expression and the right to reputation. Evidence suggests a reduction in the writs issued against media organisations since the commencement of the laws in 2006. Australia however still appears to lag others in ensuring protection against liability where matter has been published in the public interest after reasonable precautions by the publisher.

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- <sup>1</sup> United Nations Universal Declaration of Human Rights, GA Res 217A (III), UN Doc A/Res/810 (1948)
- <sup>2</sup> Roger Clarke, "What's 'Privacy'?" 2004 Australian National University  
[www.anu.edu.au/people/Roger.Clarke/DV/Privacy.html](http://www.anu.edu.au/people/Roger.Clarke/DV/Privacy.html)
- <sup>3</sup> Paul Chadwick, "Fame, media, privacy: two modest proposals for a better balance" *Australian Press Council Public Forum* (Ballarat) 5 May 2005. Chadwick in 2007 was appointed Director of Editorial Policies for the Australian Broadcasting Corporation.
- <sup>4</sup> Australian Law Reform Commission, "Review of Privacy" Issues Paper 31 2006
- <sup>5</sup> Australian Law Reform Commission, "Review of Australian privacy Law" Discussion Paper 72 September 2007
- <sup>6</sup> Discussion Paper 72 Chapter 2 "Privacy Regulation in Australia lists the federal, state and territory laws that apply to the protection of privacy.
- <sup>7</sup> Senate Legal and Constitutional References Committee, *"The Real Big Brother"* Inquiry into the Privacy Act (7.6) [2005]
- <sup>8</sup> Karen Curtis, "Launch of DIMA/OPC Memorandum of Understanding" *Speech to DIMA Secretary & Senior Management Group* 18 September 2006
- <sup>9</sup> Nigel Waters, 'Can the media and privacy ever get on?' *Privacy Law and Policy Reporter* (2002) 8 PLPR 149
- <sup>10</sup> Australian Law Reform Commission (as above) 38.105
- <sup>11</sup> Mark Pearson (as above) p392 – p402
- <sup>12</sup> Australian Privacy Foundation submission September 2007
- <sup>13</sup> Paul Chadwick (as above)
- <sup>14</sup> Australian Law Reform Commission (as above) 38.105
- <sup>15</sup> *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199
- <sup>16</sup> *Grosse v Purvis* (2003) Aust Torts Reports 81-706
- <sup>17</sup> *Doe v Australian Broadcasting Corporation* (2007) VCC 281
- <sup>18</sup> NSW Law Reform Commission Consultation Paper 1 "Invasion of privacy" Chapters 6 - 7
- <sup>19</sup> Australian Law Reform Commission (as above) 5.86
- <sup>20</sup> Australian Privacy Foundation submission September 2007
- <sup>21</sup> Office of Federal Privacy Commissioner: Survey of Attitudes towards privacy. Wallis Consulting Group 2007
- <sup>22</sup> Mark Pearson (as above) P41
- <sup>23</sup> Mark Pearson (as above) Chapter 7
- <sup>24</sup> Media and Entertainment and Arts Alliance "Turning up the Heat: The decline in press freedom in Australia from September 11 2001" – 2005
- <sup>25</sup> Submission Australian Society of Authors 4 October 2007
- <sup>26</sup> *Theophanous v Herald and Weekly Times Limited* (1994) HCA46; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520
- <sup>27</sup> Justice Steven Rares, 'Defamation: Where the reforms have taken us' Uniform National Laws and the Federal Court of Australia Paper presented at the College of Law City 2006 Autumn Intensive 29 March 2006
- <sup>28</sup> Peter Blacks, 'Freedom to Differ' *Jameel and Ors v Wall Street Journal Europe* Sprl 15 October 2006  
[http://www.freedomtodiffer.com/freedom\\_to\\_differ/2006/10/jameel\\_ors\\_v\\_wa.html](http://www.freedomtodiffer.com/freedom_to_differ/2006/10/jameel_ors_v_wa.html)
- <sup>29</sup> *Jameel & others v Wall Street Journal Europe* Sprl (2006) UK HL44
- <sup>30</sup> Geoffrey Robertson and Andrew Nicol *Media Law* (4<sup>th</sup> ed) 2002 p19-27
- <sup>31</sup> *Australian Broadcasting Corporation v O'Neil* (2006) HCA 46
- <sup>32</sup> *Theophanous* (above) at par 19
- <sup>33</sup> "2Clix withdraws law suit" *Sydney Morning Herald* 19 September 2007
- <sup>34</sup> *Broadcasting Services Act* 1992 Schedule 5
- <sup>35</sup> "Bond's bid to sue Barry thrown out" *The Age* 21 September 2007
- <sup>36</sup> Public Interest Lawyers' Statement in Support of Public Participation Law Reform, April 2006  
[http://www.wilderness.org.au/campaigns/corporate/g4c\\_launch/](http://www.wilderness.org.au/campaigns/corporate/g4c_launch/) Accessed 9 October 2007

## ANNEXURE A

### EXAMPLES OF AUSTRALIAN LAWS PROTECTING AGAINST PUBLIC DISCLOSURE OF PRIVATE FACTS

(PREPARED BY BLAKE DAWSON WALDRON FOR AUSTRALIA'S RIGHT TO KNOW)

Privacy Concern	Australian Laws	Comments
Protection of information about individuals (including information which is not confidential)	<i>Privacy Act 1988</i> (Cth) (National Privacy Principles for organisations, and Information Privacy Principles for Commonwealth Agencies)	<p>The Privacy Act regulates collection, use, disclosure and storage of personal information in the private sector through 10 NPPs. It also requires organisations disclose information about their handling of privacy practices, and handling of personal information, and to give individuals access to information about themselves.</p> <p>Acts in the course of journalism by media organisations are governed by separate privacy standards which the organisations must commit to in order to be exempt from the NPPs.</p>
Protection against inappropriate disclosure by media of private facts	<p>Privacy Standards required by media exemption in the <i>Privacy Act 1988</i> (Cth)</p> <p>There is a broad range of Commonwealth and State legislation governing access to people or the publication of information relating to privacy. Some of this legislation is outlined below.</p>	This is a very important source of protection, and provides a cheap and effective means of redress.
Confidential information	Common law and equitable causes of action for breach of confidence. In the case of government information and security information which is secret, there are also various statutory offences.	
State and Territory Government	<i>Privacy and Personal Information Protection Act</i>	In Queensland, a privacy scheme (Information Standard 42) and series of

Information privacy	<p>1998 (NSW)</p> <p><i>Information Privacy Act 2000</i> (Vic)</p> <p><i>Personal Information Protection Act 2004</i> (Tas)</p> <p><i>Information Act 2002</i> (NT)</p> <p>Various specific prohibitions on disclosure applicable to particular agencies. For example, the <i>Australian Security Intelligence Organisation Act 1979</i> (Cth), s 18.</p>	<p>statutes impose privacy obligations on state government agencies and most statutory corporations. The scheme, based on the federal Information Privacy Principles, took effect in September 2001 and includes Information Standards and Privacy Guidelines which apply across public sector operations.</p> <p>In Western Australia, the <i>Information Privacy Bill 2007</i> is currently under consideration by the legislature, and received a second reading speech on 28 March 2007. Additionally, numerous statutes regulate privacy of personal information, including <i>Freedom of Information Act 1992</i>, <i>State Records Act 2000</i>, <i>Spent Convictions Act 1988</i>, <i>Surveillance Devices Act 1998</i>, <i>Telecommunications (Interception) Western Australia Act 1996</i>.</p> <p>In South Australia, the Government has issued an administrative instruction requiring its government agencies to generally comply with a set of Information Privacy Principles and has established a privacy committee.</p> <p>Unauthorised disclosure by a person of any information or matter that has come into that person's knowledge or possession by reason of him or her being, or having been, a staff member or contractor of ASIO is an offence punishable by up to 2 years imprisonment.</p>
Telecommunications privacy (general)	<p>Part 13 of the <i>Telecommunications Act 1997</i> (Cth)</p> <p><i>Telecommunications (Interception and Access) Act 1979</i> (Cth)</p>	<p>By operation of s 303B, Part 13 of the <i>Telecommunications Act 1997</i> (Cth) effectively replaces National Privacy Principle 2 in relation to telecommunications carriers, carriage service providers, contractors and employees.</p> <p>The <i>Telecommunications (Interception and Access) Act 1979</i> (Cth) prohibits the</p>

		interception of communications passing over a telecommunications system and prohibits access to stored communications (i.e. email, SMS and voice mail messages stored on a carrier's equipment) except where authorised in specified circumstances.
Health Privacy	<p><i>Health Records and Information Privacy Act 2002</i> (NSW)</p> <p><i>Health Records Act 2001</i> (Vic)</p> <p><i>Health Records (Privacy and Access) Act 1997</i> (ACT)</p>	These Acts protect the privacy of health information in both the private and the public sectors. They are subject to media exemptions which are in similar but not identical terms to that in the Privacy Act.
Identification of victims of sexual assault	<p><i>Crimes Act 1900</i> NSW) s 578A</p> <p><i>Evidence (Miscellaneous Provisions) Act 1991</i> (ACT)</p> <p><i>Sexual Offences (Evidence and Procedure) Act</i> (NT), ss 6, 7</p> <p><i>Criminal Law (Sexual Offences) Act 1978</i> (Qld), s 6, ss 7, 8</p> <p><i>Evidence Act 1929</i> (SA) s 71A.</p> <p><i>Evidence Act 2001</i> (Tas) s 194K</p> <p><i>Judicial Proceedings Act 1958</i> (Vic), s 4(1A), (1B)</p> <p><i>Evidence Act 1906</i> (WA), s 36C</p>	<p>In each State and Territory, there are restrictions on the publication of reports of the trial of sexual offences, which restrict the identification of the victim of the alleged offence. Additionally, some States prevent the publication of the accused person.</p> <p>In NSW, it is an offence to publish any matter identifying the victim, irrespective of whether the proceedings have been dispensed with. The provision is expressly in addition to other restrictions, however it does not apply to victims:</p> <ul style="list-style-type: none"> <li>c) over 14 years who have consented; or</li> <li>d) under 14 years where a Court has authorised disclosure.</li> </ul> <p>In the ACT, it is an offence to publish the name or any other identifying information of the victim, without the victim's consent.</p> <p>In the Northern Territory, it is prohibited to publish the name, address, school or place of employment of a complainant in a sexual offence proceeding, or other details likely to identify the complainant, unless a Court has authorised. It is also prohibited to published the defendant's name, unless a Court has authorised, or unless committed for trial or</p>

sentence.

In Queensland, it is an offence to publish a report of a trial that reveals the name or other identifying information of the victim, and the accused, unless committed for trial.

In South Australia, in proceedings involving a sexual offence, there are particular restrictions, at various stages of criminal and civil proceedings, preventing or restricting identification of the complainant and accused.

In Tasmania, it is statutory contempt to name or publish other identifying information of the victim of the crime or another witness other than the accused (and the accused if the charge is for incest), unless the Court has authorised publication. The victim's consent is no defence to the contempt, *R v The Age Co Ltd* (2000) 113 A Crim R 181.

Identification of parties to and witnesses in family law proceedings

*Family Law Act* 1975 (Cth), s 121

s 121(1) prohibits any person from publishing any account of any proceedings or part of proceedings that identifies a party to proceedings, a person related to, or associated with, a party to proceedings, a person in any way concerned with the matter to which the proceedings relate, or a witness to proceedings. Ss (3) provides that identification is held to occur where the account includes a photograph or the identifiable voice of the person, or other prescribed particulars.

Under ss (9), it is a defence to publication if Court authorised, or if directed by the Court.

Identification of children involved in criminal proceedings

*Children (Criminal Proceedings) Act* 1987 (NSW), s 11

*Crimes Act* 1900 (NSW)

The *Children (Criminal Proceedings) Act* 1987 (NSW) prohibits the identification of children involved in criminal proceedings, where the child is:

e) a person to whom criminal proceedings

	<p><i>Youth Justice Act 2007</i> (NT), ss 43 and 50</p> <p><i>Juvenile Justice Act 1992</i> (Qld), ss 301 and 234</p> <p><i>Young Offenders Act 1993</i> (SA)</p> <p><i>Crimes (Family Violence) Act 1987</i> (Vic), s 24</p>	<p>relate, or a witness in criminal proceedings, being a child when the offence was committed to which those proceedings relate;</p> <p>f) mentioned in criminal proceedings, in relation to something that occurred when the person was a child;</p> <p>g) otherwise involved in criminal proceedings when a child; or</p> <p>h) the brother or sister of the victim of criminal proceedings, the victim and the person being under 18 years when the offence was committed.</p> <p>Under the Northern Territory legislation, it is an offence to publish information and details about the diversion of a youth, except in very limited circumstances (s 43). It is an offence to publish a report or information about proceedings in the Juvenile Court, or the result of proceedings against a youth, if the Court orders otherwise (s 50).</p> <p>Under the <i>Juvenile Justice Act 1992</i> (Qld), a report of criminal proceedings may not be published if it includes any identifying information of a child charged with an offence (s 301), unless the Court makes an order to that effect (s 234).</p>
Matching organ donors and donees	<i>Human Tissue Act 1983</i> (NSW) s 37	This section operates to prevent the disclosure of any information that causes the identity of a person that has given human tissue or blood, or will receive the same, to become publicly known.
Guardianship and Children's Court proceedings	<p><i>Children and Young Persons (Care and Protection) Act 1998</i> (NSW), s 105</p> <p><i>Children and Young People Act 1999</i> (ACT), s 61A</p> <p><i>Child Protection Act 1999</i> (Qld), ss 189 and 193</p> <p><i>Children's Court Act 1992</i></p>	<p>In all States and Territories, there is either some statutory restriction, or statutory power to impose a restriction, on public hearings in Children's Courts. There are also restrictions on the publication of information from such proceedings.</p> <p>NSW legislation prohibits the publication of the name of a child or young person who:</p> <p>f) appears (or is likely to appear) as a</p>



(Qld), s 20	witness before the Children's Court;
<i>Children's Protection Act 1993</i> (SA), s 59A	g) is involved (or likely to be involved) in any capacity in any non-Court proceedings;
<i>Children, Youth and Families Act 2005</i> (Vic), s 534	h) with respect to whom proceedings in the Children's Court are brought;
<i>Children's Court of Western Australia Act 1988</i> (WA), s 35	i) who is (or is likely to be) mentioned in any non-Court or Children's Court proceedings; or
<i>Children, Young Persons and their Families Act 1997</i> (Tas), ss 40 and 103	j) who is the subject of certain reports.
<i>Magistrates Court (Children's Division) Act 1998</i> (Tas), s 12	ACT legislation restricts publication of an account or report of a Children's Court proceeding if it discloses the identity of a child or a family member, or allows their identity to be ascertained (s 61A).
<i>Youth Justice Act 1997</i> (Tas), ss 22, 30, 31, 45 and 108	The <i>Child Protection Act 1999</i> (Qld) restricts publications identifying a child as being the subject of an investigation or order relating to harm or risk of harm under that Act, or as being harmed by a parent or family member (s 189). For sexual offence cases, there is a prohibition on reports identifying any child witness or victim unless the Court orders otherwise (s 193(1)).
	Under the <i>Children's Protection Act 1993</i> (SA), it is an offence to publish a report of proceedings in which a child is alleged to be at risk or in need of care or protection, if the Court prohibits any such report, or if the report publishes any identifying information of any child concerned in the proceedings, as a party or witness (s 59A).
	The <i>Children, Youth and Families Act 2005</i> (Vic) prohibits the publication of a report of Children's Court Proceedings without the permission of the President if it contains any identifying information of the venue, a child or other party to the proceedings, or a witness (s 534).
	In Western Australian, reports are prohibited of Children's Court proceedings (or appeal proceedings), or any proceedings

		<p>on appeal from that Court, which contain any identifying information of a party, a witness or an alleged victim of an offence.</p> <p>In Tasmania, a person must not publish a decision of, any report relating to, or anything said or done at a family conference under the <i>Children, Young Persons and their Families Act 1997</i> (Tas). Under the <i>Magistrates Court (Children's Division) Act 1998</i> (Tas), a person must not (without the Court's permission) publish a report of proceedings of the Court if the report identifies, or contains information, that may lead to identification of a child the subject of, a party to or a witness in proceedings.</p>
Adoption proceedings	<p><i>Adoption Act 1993</i> (ACT), ss 4, 96, 97, 112, 112 and 114</p> <p><i>Adoption Act 2000</i> (NSW), ss 3, 119, 178, 179, 180, 186, 194 and 205</p> <p><i>Adoption of Children Act 1994</i> (NT), ss 3, 70, 71, 72 and 79</p> <p><i>Adoption of Children Act 1964</i> (Qld), ss 6, 44, 45, 58 and 59</p> <p><i>Adoption Act 1988</i> (SA), ss 4, 24, 31, 32 and 36</p> <p><i>Adoption Act 1988</i> (Tas), ss 3, 93, 100, 101, 108 and 109</p> <p><i>Adoption Act 1984</i> (Vic), ss 4, 83, 107, 120 and 121</p> <p><i>Adoption Act 1984</i> (WA), ss 4, 84, 123, 124, 127 and 133.</p>	<p>Adoption hearings are always held in closed Court and Court records of the proceedings are not open to public inspection.</p> <p>In all States and Territories, it is an offence to publish without the authority of the Court (and, in Victoria, without the consent of the identified party), in relation to adoption proceedings, the name or any other matter likely to identify an applicant for adoption, the child or the parent or guardian of the child.</p> <p>It is an offence to publish any matter indicating that a person wishes to have a child adopted, that a person wishes to adopt a child, or that a person is willing to make arrangements with a view to adoption. In New South Wales, the prohibition is specifically applied to online advertising.</p>
Coroners' powers	<p><i>Coroners Act 1997</i> (ACT), s 40.</p> <p><i>Coroners Act 1980</i> (NSW), ss 44 and 45</p> <p><i>Coroners Act 1993</i> (NT), ss</p>	<p>In some States, a coroner has power to order that coronial proceedings be held in closed Court. The basis on which the coroner may make such an order is variously expressed in the legislation, including by reference to the interests of the administration of justice (ACT), national security (NSW, NT and</p>

	3, 42 and 43	Tas) and the interests of justice, the public or a particular person (Qld).
	<i>Evidence Act 1939</i> (NT), ss 4 and 57	In most jurisdictions, a coroner has power to order that there be no publication of some or all the evidence or of the coroner's report. Failure to comply with such an order is an offence.
	<i>Coroners Act 2003</i> (Qld), ss 41 and 43	
	<i>Evidence Act 1929</i> (SA), ss 4, 5, 68, 69 and 69A	
	<i>Coroners Act 1995</i> (Tas), ss 56 and 57	
	<i>Coroners Act 1985</i> (VIC), ss 47 and 58	
	<i>Coroners Act 1996</i> (WA), ss 45 and 49	
Juries	<i>Juries Act 1967</i> (ACT), s 42C	In the ACT and Western Australia, it is an offence to publish information that identifies or is likely to identify a person as a juror or particular proceedings.
	<i>Jury Act 1977</i> (NSW), ss 68, 68A and 68B	
	<i>Juries Act (NT)</i> , ss 49A and 49B	In Victoria, it is an offence to publish any information or image that identifies or is capable of identifying a person attending a jury service.
	<i>Jury Act 1995</i> (Qld), s 70	
	<i>Juries Act 2000</i> (Vic), ss 77 and 78	In NSW, it is an offence to publish any information likely to lead to identification of a juror or former juror (except with the former juror's consent).
	<i>Juries Act 1957</i> (WA), ss 56A, 56B, 56C, 56D, 56E and 57.	In the Northern Territory, it is an offence to publish or otherwise disclose identifying information about a juror, during the course of proceedings, except with leave of the Court.
		In Western Australia, it is a contempt to take or publish any photo or other likeness of any juror empanelled for any proceedings.
		In some States and Territories, the solicitation of information from jurors and publication of jury deliberations is prohibited.

Statements that cannot be proved true, and which adversely affect a person's reputation or cause others to shun or avoid him or her	<i>Defamation Act 2005</i> (NSW) <i>Defamation Act 2005</i> (Qld) <i>Defamation Act 2005</i> (SA) <i>Defamation Act 2005</i> (Tas) <i>Defamation Act 2005</i> (Vic) <i>Defamation Act 2005</i> (WA) <i>Civil Law (Wrongs) Act 2002</i> (ACT) <i>Defamation Act 2005</i> (NT)	<p>Uniformity was achieved in 2006.</p> <p>A decision was made in relation to the 2006 reforms to adopt the longstanding common law position that truth alone is a defence.</p> <p>A range of defences other than truth are available in circumstances in which it is important to ensure freedom of communication even where people get it wrong.</p>
Online behaviour which is menacing harassing or offensive	<i>Criminal Code Act 1995</i> (Cth) s 471.12	<p>It is an offence to use a carriage service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.</p> <p>Publication of private facts may sometimes fall within this category.</p>
Monitoring or recording of private conversations or activities	<i>Workplace Surveillance Act 2005</i> (NSW) <i>Listening Devices Act 1984</i> (NSW) <i>Telecommunications (Interception) Act 1979</i> (Cth) <i>Listening Devices Act 1992</i> (ACT) <i>Surveillance Devices Act 2000</i> (NT) <i>Surveillance Devices Act 1999</i> (Vic) <i>Surveillance Devices Act 1998</i> (WA) <i>Listening Devices Act 1991</i> (Tas) <i>Invasion of Privacy Act 1971</i> (Qld) <i>Listening and Surveillance Devices Act 1972</i> (SA)	<p>Each of these Acts prohibit use of a device to listen to, record or monitor certain private conversations or activities. All of them cover listening devices. Some extend to photography/video, tracking and/or data surveillance. In each case, the range of activities extend beyond "spy" like activities to activities such as use of an ordinary tape recorder to record a private conversation. All contain exceptions where the parties to the conversation or activity consent.</p> <p>All of these Acts contain prohibitions on use and disclosure of information obtained through the illegal use of a device.</p>

Spent Convictions	<p>Part VIIC of the <i>Crimes Act 1914</i> (Cth), the Commonwealth "Spent Convictions Scheme"</p> <p><i>Criminal Records Act 1991</i> (NSW)</p> <p><i>Criminal Records (Spent Convictions) Act</i> (NT)</p> <p><i>Criminal Law (Rehabilitation of Offenders) Act 1986</i> (Qld)</p>	<p>These Acts contain restrictions on use and disclosure of certain old ("spent") convictions.</p> <p>Part VIIC of the <i>Crimes Act 1914</i> (Cth) implements the Commonwealth "Spent Convictions Scheme".</p> <p>In both Queensland and the Northern Territory, it is an offence to disclose a spent conviction without the permission of the convicted person. In New South Wales it is an offence to disclose information concerning a spent conviction without lawful authority.</p>
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This table is not exhaustive.

## **ANNEXURE B**

### **JOURNALISM STANDARDS**

#### **2 Terms of journalism exemption**

The mechanism for the journalism exemption is as follows:

- (i) Section 7B(4) of the Act provides that:

An act done, or practice engaged in, by a media organisation is *exempt* for the purposes of paragraph 7(1)(ee) if the act is done, or the practice is engaged in:

- (A) by the organisation in the course of journalism; and
- (B) at a time when the organisation is publicly committed to observe standards that:
  - deal with privacy in the context of the activities of a media organisation (whether or not the standards also deal with other matters); and
  - have been published in writing by the organisation or a person or body representing a class of media organisations.

- (ii) Subsection 7(1)(ee) provides that a reference in the Act to an "act or practice" is a reference to an act done, or a practice engaged in, by an organisation, other than an exempt act or practice.

- (iii) The provisions of the Act which require organisations to comply with the NPPs, deal with interferences with privacy, and authorise the Commissioner powers to investigate and make determinations, apply to the acts and practices of organisations, but not to those of media organisations falling within the exemption: sections 13A, 16A, 27(1)(ab) and 36(1).

- (iv) The term "media organisation" is defined in section 6 of the Act to mean:

- (A) an organisation whose activities consist of or include the collection, preparation for dissemination or dissemination of the following material for the purpose of making it available to the public:

- material having the character of news, current affairs, information or a documentary;
  - material consisting of commentary or opinion on, or analysis of, news, current affairs, information or a documentary.
- (v) The word "journalism" and "in the course of journalism" are not defined. We consider that they should be defined in a way that takes into account the wide variety of forms which journalism now takes, which ranges from internet postings by individuals on sites such as MySpace and YouTube to mass media broadcasts and articles.

## **Media Privacy Standards**

The key Australian media privacy regulations are:

### **Free TV Commercial Television Industry Code of Practice**

In broadcasting news and current affairs programs, television licensees:

- 4.3.3 should have appropriate regard to the feelings of relatives and viewers when including images of dead or seriously wounded people. Images of that kind which may seriously stress or offend a substantial number of viewers should be displayed only when there is an identifiable public interest reason for doing so;
- 4.3.5. must not use material relating to a person's personal or private affairs, or which invades an individual's privacy, other than where there is an identifiable public interest reason for the material to be broadcast;
  - 4.3.5.1 for the purpose of this clause 4.3.5, licensees must exercise special care before using material relating to a child's personal or private affairs in the broadcast of a report of a sensitive matter concerning the child. The consent of a parent or guardian should be obtained before naming or visually identifying a child in a report on a criminal matter involving a child or a member of a child's immediate family, or a report which discloses sensitive information concerning the health

or welfare of a child, unless there are exceptional circumstances or an identifiable public interest reason not to do so;

- 4.3.6 must exercise sensitivity in broadcasting images of or interviews with bereaved relatives and survivors or witnesses of traumatic incidents;
- 4.3.7 should avoid unfairly identifying a single person or business when commenting on the behaviour of a group of persons or businesses;
- 4.3.8 must take all reasonable steps to ensure that murder and accident victims are not identified directly or, where practicable, indirectly before their immediate families are notified by the authorities.
- 4.3.9 should broadcast reports of suicide or attempted suicide only where there is an identifiable public interest reason to do so, and should exclude any detailed description of the method used. The report must be straightforward and must not include graphic details of images, or glamourise suicide in any way.

The Code of Practice also contains an Advisory Note which provides additional guidance to broadcasters and the public on privacy issues.

### **Subscription Broadcast Television Code of Practice**

In broadcasting news and current affairs programs, subscription broadcasting television licensees:

- (vi) to the extent practicable, must display sensitivity in broadcasting images of, or interviews with, bereaved relatives and survivors or witnesses of traumatic incidents (section 2.2(b)(iii)); and
- (vii) must not use material relating to a person's personal or private affairs, or which invades an individual's privacy, other than where there are identifiable public interest reasons for the material to be broadcast.

### **Commercial Radio Codes of Practice**



In the preparation and presentation of current affairs programs, radio licensees must ensure that:

respect is given to each person's legitimate right to protection from unjustified use of material which is obtained without an individual's consent or other unwarranted and intrusive invasions of privacy (section 2.2(e) of Code of Practice 2: News and Current Affairs Programs).

### **ACMA “Privacy Guidelines for Broadcasters”**

The Privacy Guidelines for Broadcasters provides additional information and guidance for the public and for broadcasters on the following privacy issues:

1. material relating to a person’s private affairs, including discussion of:
  - a. the distinction between public and private conduct;
  - b. the treatment of publicly available personal information;
  - c. the issue of consent;
  - d. the position with respect to public figures;
2. what constitutes Public Interest

The Guidelines are supplemented by a number of case studies and includes the relevant provisions from each of the broadcasting codes.

### **Australian Journalists' Association (AJA) Code of Ethics**

The AJA Code requires journalists to:

- (viii) ... use fair, responsible, and honest means to obtain material ... Identify yourself and your employer before obtaining an interview ... (section 8); and
- (ix) ... respect private grief and personal privacy ... (section 11).

## **Australian Press Council Statement of Principles**

The Australia Press Council Statement of Principles states that:

Readers of publications are entitled to have news and comment presented to them honestly and fairly, and with respect for the privacy and sensibilities of individuals. However, the right to privacy should not prevent publication of matters of public record or obvious or significant public interest (section 3).

The Australian Press Council Privacy Standards supplement the core statement of principle on privacy articulated by the Council above.

# INDEPENDENT AUDIT OF THE STATE OF FREE SPEECH MEDIA IN AUSTRALIA

## The Audit Team

**Irene Moss AO** is the chair of the audit. She has a Bachelor of Arts and a Bachelor of Laws from Sydney University and a Master of Laws from Harvard University. She was granted an honorary doctorate by the University of NSW in 2006. She has formerly held positions as Commissioner of the Independent Commission Against Corruption, as NSW Ombudsman and as Federal Race Discrimination Commissioner, among others. Irene sits on several boards and is a Fellow of the Sydney University Senate.

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**Jane Deamer** is research director of the audit and one of the main authors of the report. She is a lawyer who practised for many years in commercial litigation as both a solicitor and barrister. Jane was a member of the Fair Trading Tribunal from 1999 to 2002 and of the Consumer, Trader and Tenancy Tribunal from 2002 to 2007. She has recently been appointed a part-time member of the Social Security Appeals Tribunal (from 1 January 2008).

**Geoff Briot** is a researcher with the audit, who also helped draft the report. Geoff has been a school and university teacher, a federal public servant and a journalist and publisher. Most recently he was a senior investigator with the NSW Ombudsman, where he worked for more than 10 years.

**Erin Tennant** is a researcher with the audit, who also helped draft the report. He is a news producer for ninemsn, based in Sydney. He worked as a reporter for the past eight years, including for Fairfax (*Sydney Morning Herald*), Cumberland Newspapers (*Blacktown Advocate*) and overseas in Canada (*Haliburton County Echo*). He recently completed a Master of Legal Studies (Honours), with a research project on the use of confidential sources in journalism. He also has a Bachelor of Arts, majoring in history and sociology.

**Alison Larsen** is a research assistant with the audit team. She is completing a Bachelor of Communications at the University of Western Sydney, Penrith, with a major in journalism. Alison has completed extensive voluntary work experience over the past three years in print, television and radio. She regards her work with the audit as her most fulfilling role so far and has high hopes for a long and rewarding career as a journalist.

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